No. 15-35
Vide 14-1418, 14-1453, 14-1505, 15-105, 15-119,15-191

Title:	East Texas Baptist University,et al., Petitioners
	v.
	Sylvia Burwell, Secretary of Health and Human Services,et al
Docketed:	July 9, 2015
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(14-20112)
Decision Date:	June 22,2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Jul 8 2015	Petition for a writ of certiorari filed. (Response due August 10,2015)
Jul 28 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Aug 10 2015	Order extending time to file response to petition to and including September 9, 2015.
Aug 10 2015	Brief amici curiae of Texas, et al. filed.
Aug 10 2015	Brief amicus curiae of Ethics and Religious Liberty Commission and International Mission Board filed.
Aug 10 2015	Brief amici curiae of Christian and Missionary Alliance Foundation, Inc., et al. filed.
Aug 10 2015	Brief amicus curiae of The Council for Christian Colleges & Universities filed.
Sep 9 2015	Brief of respondents Sylvia Burwell, Secretary of Health and Human Services,et al.in opposition filed.
Sep 10 2015	Letter dated September 9, 2015, from counsel for petitioners received waiving the 14-day waiting period pursuant to Rule 15.5.
Sep 16 2015	Reply of petitioners East Texas Baptist University,et al. filed.
Sep 22 2015	Supplemental brief of petitioners East Texas Baptist University,et al. filed.
Oct 1 2015	Letter dated September 30, 2015, with attached September 30, 2015 order of the United States Court of Appeals for the Fifth Circuit, received from counsel for the respondent.
Oct 14 2015	DISTRIBUTED for Conference of October 30, 2015.
Nov 2 2015	DISTRIBUTED for Conference of November 6, 2015.
Nov 6 2015	Petition GRANTED The petition for a writ of certiorari in No. 14-1418 is granted limited to Question 1 presented by the petition. The motion of Association of American Physicians & Surgeons, et al. for leave to file a brief as amici curiae and the petition for a writ of certiorari in No.14-1453 are granted. The petitions for writs of certiorari in Nos. 14-1505, 15-119 and 15-191 are granted. The petition for a writ of certiorari in No.15-105 is granted limited to Questions 1 and 2 presented by the petition. The cases are consolidated.
Nov 6 2015	Letter from The Clerk to counsel for the parties requesting a joint briefing proposal by 1 p.m., Monday, November 16,2015. VIDED

Nov 16 2015	Briefing proposal of the parties received. VIDED
Nov 17 2015	The briefing proposal set forth in the parties' letter of November 16,2015, is adopted. Petitioners in Nos. 14-1418, 14-1453, and 14-1505 will file one consolidated opening brief and one reply brief. Petitioners in Nos. 15-35, 15-105, 15-119, and 15-191will file one consolidated opening brief and one reply brief. Petitioner's opening briefs, not to exceed 20,000 words each, are to be filed on or before January 4, 2016.Respondents will file one consolidated brief, not to exceed 22,500 words, on or before February 10, 2016. Petitioner's reply briefs, not to exceed 8,000 words each, are to be filed on or before March 11,2016. VIDED
Dec 7 2015	Joint motion for divided argument and enlargement of time for oral argument filed by petitioners. VIDED.
Dec 14 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondents. VIDED
Dec 15 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received, on behalf of all petitioners, in these consolidated cases. VIDED
Jan 4 2016	Joint appendix filed.(3 Volumes).(Statement of costs filed) VIDED.
Jan 4 2016	Brief of Petitioners in Nos.14-1418, 14-1453 & 14-1505 filed. VIDED.
Jan 4 2016	Brief of Petitioners in Nos.15-35, 15-105, 15-119, & 15-191 filed.VIDED.
Jan 5 2016	Brief amici curiae of Orthodox Jewish Rabbis filed. VIDED.
Jan 8 2016	Brief amici curiae of United States Conference of Catholic Bishops, et al.filed. VIDED.
Jan 8 2016	Brief amici curiae of CNS International Ministries, Inc. and Heartland Christian College filed. VIDED.
Jan 8 2016	Brief amicus curiae of the Breast Cancer Prevention Institute filed. VIDED.
Jan 10 2016	Brief amici curiae of Residents and Families of Residents at Homes of the Little Sisters of the Poor filed.VIDED.
Jan 11 2016	Brief amicus curiae of The School of the Ozarks, Inc.,d/b/a College of the Ozarks filed.VIDED.
Jan 11 2016	Brief amici curiae of Texas, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Southern Baptist Theological Seminary, et al.filed.VIDED.
Jan 11 2016	Brief amici curiae of Christian Legal Society, et al.filed.VIDED.
Jan 11 2016	Brief amici curiae of Church of the Lukumi Babalu Aye,Inc., et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Christian and Missionary Alliance Foundation, Inc.,et al. filed.VIDED.
Jan 11 2016	Brief amici curiae of 207 Members of Congress filed.VIDED.
Jan 11 2016	Brief amici curiae of National Jewish Commission on Law and Public Affairs (COLPA)filed. VIDED.
Jan 11 2016	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. filed. VIDED.
Jan 11 2016	Brief amici curiae of Former Justice Department Officials filed.VIDED.
Jan 11 2016	Brief amicus curiae of Ethics and Public Policy Center filed.VIDED.
Jan 11 2016	Brief amici curiae of The Cato Institute and Independent Women's Forum filed. VIDED.
Jan 11 2016	Brief amici curiae of National Association of Evangelicals, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of 50 Catholic Theologians and Ethicists filed.VIDED.
Jan 11 2016	Brief amici curiae of Constitutional Law Scholars filed. VIDED.
Jan 11 2016	Brief amicus curiae of Women Speak for Themselves filed. VIDED.
Jan 11 2016	Brief amicus curiae of Liberty Counsel filed. VIDED.
Jan 11 2016	Brief amicus curiae of Council for Christian Colleges and Universities filed. VIDED.
Jan 11 2016	Brief amicus curiae of the Knights of Columbus filed.VIDED.
Jan 11 2016	Brief amici curiae of Association of American Physicians & Surgeons, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Bart Stupak, et al. filed. VIDED.

Jan 11 2016	Brief amici curiae of Dominican Sisters of Mary, Mother of the Eucharist, et al. filed. VIDED.
Jan 11 2016	Brief amicus curiae of Thomas More Law Center filed. VIDED.
Jan 11 2016	Brief amici curiae of ACNA Jurisdiction of the Armed Forces and Chaplaincy, et al. filed. VIDED.
Jan 11 2016	Brief amicus curiae of Eternal Word Television Network filed. VIDED.
Jan 11 2016	Brief amicus curiae of David Boyle filed. VIDED.
Jan 11 2016	Brief amicus curiae of Justice and Freedom Fund filed. VIDED.
Jan 11 2016	Brief amici curiae of Thirteen Law Professors filed. VIDED.
Jan 11 2016	Brief amicus curiae of International Conference of Evangelical Chaplain Endorsers filed. VIDED.
Jan 11 2016	Brief amicus curiae of Concerned Women for America filed. VIDED.
Jan 11 2016	Brief amicus curiae of Michael J. New, Ph.D., Associate Scholar at the Charlotte Lozier Institute filed. VIDED.
Jan 11 2016	Brief amicus curiae of American Center for Law and Justice filed. VIDED.
Jan 11 2016	Brief amici curiae of U.S. Justice Foundation, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Carmelite Sisters of the Most Sacred Heart of Los Angeles, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of The Catholic Benefits Association, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Religious Institutions filed. VIDED.
Jan 15 2016	Joint motion for divided argument and enlargement of time for oral argument GRANTED. VIDED
Jan 29 2016	SET FOR ARGUMENT ON Wednesday, MARCH 23, 2016. VIDED
Feb 8 2016	Record requested from U.S.C.A. 5th Circuit.
Feb 10 2016	CIRCULATED.
Feb 10 2016	Brief of respondents Sylvia Burwell, Secretary of Health and Human Services, et al. filed. VIDED. (Distributed)
Feb 10 2016	Brief amicus curiae of American Humanist Association filed. VIDED. (Distributed)
Feb 11 2016	Record received from the U.S.C.A. 5th Circuit is electronic and located on PACER.
Feb 12 2016	Brief amici curiae of Harvard Law School Center for Health Law and Policy Innovation, et al. filed. VIDED. (Distributed)
Feb 16 2016	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED. (Distributed)
Feb 16 2016	Brief amici curiae of Church-State Scholars filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The Ovarian Cancer Research Fund Alliance, et al. (2 Volumes) filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Baptist Joint Committee for Religious Liberty filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Compassion & Choices filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of National Women's Law Center and 68 Other Organizations filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Norman Dorsen, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of American Jewish Committee, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of American College Of Obstetricians and Gynecologists, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of National Latina Institute for Reproductive Health, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Catholics for Choice, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Former State Attorneys General, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Foreign and International Law Experts Lawrence O. Gostin, et al. filed. VIDED. (Distributed)

Feb 17 2016	Brief amici curiae of 240 students, Faculty, and staff at Religiously Affiliated Universities filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of American Academy of Pediatrics filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Scholars of Religious Liberty Sarah Barringer Gordon, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Health Policy Experts filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Anti-Defamation League, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Black Women's Health Imperative filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The Guttmacher Institute, and Professor Sara Rosenbaum filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Lambda Legal Defense and Education Fund, Inc. et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of 123 Members of the United States Congress filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Military Historians filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The National Health Law Program, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of California, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Honorable Robert C. "Bobby" Scott filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The Center for Inquiry, and American Atheists filed. VIDED. (Distributed)
Mar 4 2016	Letter from counsel for the respondents with copy of C.A. 11th Circuit opinion attached. (Distributed) VIDED.
Mar 11 2016	Reply of Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191 filed. VIDED. (Distributed)
Mar 11 2016	Reply of Petitioners in Nos. 14-1418, 14-1453 & 14-1505 filed. VIDED. (Distributed)
Mar 23 2016	Argued. For petitioners in Nos. 15-35, 15-105, 15-119 & 15-191: Paul D. Clement, Washington, D.C. For petitioners in Nos. 14-1418, 14-1453, & 14-1505: Noel Francisco, Washington, D.C. For respondents: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D.C. VIDED.
Mar 29 2016	The parties are directed to file supplemental briefs that address whether and how contraceptive coverage may be obtained by petitioner's employees through petitioner's insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees. Petitioners with insured plans are currently required to submit a form either to their insurer or to the Federal Government (naming petitioner's insurance company), stating that petitioners object on religious grounds to providing contraceptive coverage. The parties are directed to address whether contraceptive coverage could be provided to petitioner's employees, through petitioner's insurance companies, without any such notice from petitioners. For example, the parties should consider a situation in which petitioners would contract to provide health insurance for their employees, and in the course of obtaining such insurance, inform their insurance company that they do not want their health plan to include contraceptive coverage of the type to which they object on religious grounds.
Mar 29 2016	Petitioners would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the Federal Government, or to their employees. At the same time, petitioner's insurance company. aware that petitioners are not providing certain contraceptive coverage on religious ground would separately notify Petitioner's employee's that the insurance company will provide cost-free contraceptive coverage, and that such coverage is not paid for by petitioners and is not provided through Petitioner's health plan. The parties may address other proposals along similar lines,

	avoiding repetition of discussion in prior briefing. The briefs, limited to a single brief 25 pages in length for petitioners, and a single brief 20 pages in length for respondents, are to be filed simultaneously with the Clerk and served upon counsel for the other parties on or before April 12, 2016. Reply briefs, limited to a single brief 10 pages in length for petitioners and for respondents, are to be filed simultaneously with the Clerk and served upon opposing counsel for the other parties on or before April 20, 2016. VIDED
Apr 12 2016	Supplemental brief of petitioners filed. VIDED. (Distributed)
Apr 12 2016	Supplemental brief of respondents Sylvia Burwell, Secretary of Health and Human Services, et al. filed. VIDED. (Distributed)
Apr 20 2016	Supplemental reply brief of petitioners filed. VIDED. (Distributed
Apr 20 2016	Supplemental reply brief of respondents filed. VIDED. (Distributed)
May 16 2016	Judgment VACATED and case REMANDED. Opinion per curiam. Sotomayor, J., filed a concurring opinion, in which Ginsburg, J., joined. VIDED.
Jun 17 2016	JUDGMENT ISSUED

No. 15-35

Supreme Court, U.S.
FILED
JUL - 8 2015

In the Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS

v.

SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The text of the Affordable Care Act says nothing about contraceptive coverage, but it does require employers to "provide coverage" for "preventive care" for women. Despite the obvious implications for many employers of deep religious conviction, HHS interpreted that statutory mandate to require all nonexempt employers to provide at no cost the full range of FDA-approved contraceptives, including some that cause abortions, under the auspices of their plans. This Court has already considered this contraception mandate and concluded that it imposes a substantial burden on religious exercise and violates the Religious Freedom Restoration Act (RFRA). However, the government offers nonprofit religious employers such as petitioners one option for complying with the contraception mandate not available to for-profit employers—namely, executing certain forms that ensure that their employees receive the full range of contraception coverage under the auspices of the employers' healthcare plans and, in the government's view, put these religious employers in compliance with the statutory "provide coverage" obligation. It is undisputed that petitioners have a sincere religious objection to complying with the mandate in this way and that non-compliance will result in draconian fines. The question presented is:

Does the availability of a regulatory option for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

Petitioners, who were Plaintiffs below, are Houston Baptist University, East Texas Baptist University, and Plaintiff-Intervenor Westminster Theological Seminary. No petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners.

Respondents, who were Defendants below, are Sylvia Burwell in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

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Appendix A: Opinion of the United States Court of Appeals for the Fifth Circuit (June 22, 2015) 1a

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are two religious colleges and a theological seminary that provide generous healthcare plans to their employees. Those plans include free access to fourteen different kinds of contraceptives. But those plans exclude four types of contraceptives that petitioners believe constitute abortifacients. No one doubts the sincerity of petitioners' religious beliefs. Nonetheless, the Department of Health and Human Services believes that petitioners' employees must have free access to those four contraceptives under the auspices of petitioners' plans in order for petitioners to comply with the Affordable Care Act and the agency's contraceptive mandate and to avoid draconian penalties.

This Court addressed a nearly identical dynamic in upholding the religious exercise claim of two for-profit companies in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). Although the underlying contraception mandate and the penalties for non-compliance are identical here, there is one potentially salient difference when it comes to nonprofit religious employers: The agencies offer religious nonprofits an option for complying with the contraception mandate that is not available to for-profit companies. Under this so-called "accommodation," nonprofit religious employers may comply with the contraception mandate by executing certain forms. Those forms have important legal and practical consequences. As a legal matter, they suffice to allow the government to deem the nonprofit religious employers and their plans in compliance with their statutory obligation to "provide coverage," which as a regulatory matter must include the full range of FDA-approved contra-

ceptives. The forms also allow the government to conclude that the benefits are being provided under the operation of the nonprofit religious employers' own plans. And, as a practical matter, the requisite forms are sufficient to ensure that employees of the nonprofit religious employers, in fact, will be able to receive the full range of FDA-approved contraceptives in connection with their employers' healthcare plans.

Because this regulatory option for complying with the contraception mandate has the same legal and practical consequences as complying with the mandate directly, it is not surprising that numerous religious employers find it no more compatible with their religious beliefs. They sincerely believe that fulfilling the contraceptive mandate via this regulatory option facilitates the provision of contraceptives and abortifacients and makes them complicit in actions that violate their religious beliefs. No one, it bears repeating, questions the sincerity of those religious beliefs. And a long line of this Court's cases, including but by no means limited to *Hobby Lobby*, make clear beyond cavil that courts are not free to second-guess the sincerity of those religious beliefs by suggesting that the degree of involvement deemed sufficient by the government is insufficient to violate religious scruples. Thus, especially after *Hobby Lobby*, there should be no doubt that the contraceptive mandate imposes a substantial burden on petitioners' religious exercise. The contraceptive mandate and the penalties for noncompliance are identical, and petitioners sincerely believe that the regulatory option for complying with the mandate violates their religion. That should be the end of the substantial burden inquiry.

Remarkably, however, the court of appeals here (like other circuits) concluded that there is no substantial burden on religious exercise. It did so only by yielding to the temptation to conclude that the degree of complicity demanded by the government was insufficient to constitute a substantial burden. That conclusion plainly conflicts with *Hobby Lobby* and this Court's other decisions forbidding courts from engaging in any such inquiry.

That would be reason enough for this Court's plenary review, but a number of additional considerations strongly support this Court's review at this juncture. This Court has already had to use its extraordinary authority under the All Writs Act in three different cases involving challenges to the contraception mandate by nonprofit religious employers. The felt need for that extraordinary intervention not only underscores the extraordinary importance of this issue, but also makes clear that deferring review will produce not orderly percolation, but the need for further extraordinary intervention by this Court. What is more, petitioners here are at the end of the line with respect to their RFRA claims. Unlike cases that arise in a preliminary injunction posture, petitioners prevailed on summary judgment only to have the court of appeals conclude they could not even show a substantial burden. That reasoning is plainly inconsistent with this Court's precedents. It is inevitable that this Court will need to address this issue on the merits. It should do so in time to ensure that petitioners' rights to religious exercise are not sacrificed to a fundamentally misguided decision about what constitutes a substantial burden and what con-

stitutes the proper role for an Article III court in evaluating sincere religious beliefs.

OPINIONS BELOW

The opinion of the district court is reported at 988 F. Supp. 2d 743. App.31a. The opinion of the Fifth Circuit is reported at --- F.3d ---, 2015 WL 3852811. App.1a.

JURISDICTION

The judgment of the Fifth Circuit was entered on June 22, 2015. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." U.S. Const. amend. I. The relevant statutory and regulatory provisions are in Appendix D (App.89a).

STATEMENT

The Contraceptive Mandate

The Affordable Care Act mandates that any "group health plan" must "provide coverage" for certain "preventive care" for women without "any cost sharing." 42 U.S.C. § 300gg-13(a), (a)(4). Congress itself did not define "preventive care" but instead allowed HHS to do so. 42 U.S.C. § 300gg-13(a)(4). HHS in turn outsourced that task to the Institute of Medicine, a private organization. *Hobby Lobby*, 134 S.Ct. at 2762. The Institute's definition, which HHS adopt-

ed wholesale, includes all FDA-approved contraceptive methods and sterilization procedures, including four methods that can prevent the implementation of a fertilized egg: Plan B (the "morning-after" pill), Ella (the "week-after" pill), and two types of intrauterine devices (IUDs). *Id.* at 2762-63. Failure to "provide coverage" for all FDA-approved methods and procedures triggers severe penalties. See, *e.g.*, 26 U.S.C. § 4980D ($100 per day per affected individual); 26 U.S.C. § 4980H ($2000 per year per full-time employee).

The mandate to cover all FDA-approved forms of contraception is not universal; instead, it is subject to both statutory and regulatory exemptions. First, as a statutory matter, employers with "grandfathered" healthcare plans—plans that existed before March 30, 2010, and have not made certain changes after that date—need not comply with the "provide coverage" mandate at all. See 42 U.S.C. § 18011; *Hobby Lobby*, 134 S.Ct. at 2764. Although these plans cover tens of millions of individuals and must comply with a subset of ACA reforms that "HHS has described as 'particularly significant protections,'" the statutory mandate to cover preventative care, which has been administratively interpreted to mandate contraceptive coverage, "is expressly excluded from this subset." *Id.* at 2780 (quoting 75 Fed. Reg. 34540 (June 17, 2010)); see also 42 U.S.C. § 18011(a)(4). That exclusion exists "simply [to serve] the interest of employers in avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S.Ct. at 2764. Although HHS has suggested that it intends to phase grandfathered plans out over time, it has not actually done so; instead, "[g]randfathered plans may remain

so indefinitely." *Hobby Lobby* v. *Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc).

Second, the statute provides that employers with fewer than fifty employees are not required to offer insurance at all. See 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). Accordingly, these small employers—who collectively employ an estimated 34 million Americans—can avoid the contraceptive mandate by declining to offer their employees insurance. *Hobby Lobby*, 134 S.Ct. at 2764.

Third, after an initial outcry, HHS recognized that its contraceptive mandate implicated sincere religious objections and thus created a regulatory exemption for certain "religious employers." 78 Fed. Reg. 39870, 39874 (July 2, 2013); 45 C.F.R. 147.131(a). This exemption is available to tens of thousands of churches and associations of churches, as well as to "integrated auxiliaries" of churches—a category defined by how closely an organization is affiliated with or controlled by a church. 26 C.F.R. 1.6033-2(h). A "religious employer" need not do anything to avail itself of this exemption; it need not certify its religious beliefs, execute or deliver any forms, provide notice to HHS or any other government authority, or do anything that would result in its employees receiving contraceptive coverage in connection with its healthcare plan.

Nonprofit Religious Organizations and the Mandate

Although HHS was well aware that religious objections to the contraceptive mandate were by no means limited to houses of worship, their associa-

tions, or their "integrated auxiliaries," it nonetheless refused to exempt other nonprofit religious organizations from the statutory requirement to provide preventative coverage, which by regulation extends to providing all FDA-approved contraceptives free of cost.[1] Accordingly, countless religious colleges and seminaries, faith-based charities, orders of nuns, and other religious organizations remain subject to the contraceptive mandate. Instead of exempting these nonprofit employers, HHS offered them an additional means, unavailable to objecting for-profit employers, through which they can "comply" with the mandate to provide contraceptive coverage. 78 Fed. Reg. at 39879 ("an eligible organization is considered to comply with section 2713 of the PHS Act"). To be clear, this so-called "accommodation" is a means by which the nonprofit can fulfill its statutory obligation to provide coverage, not an exemption from that obligation.

More specifically, this regulatory option requires a nonexempt religious employer to "self-certify" that it is a religious employer and has religious objections to providing some or all FDA-approved contraceptive methods. 26 C.F.R. 54.9815-2713AT(b)(ii)(A), (c)(1). By doing so, the employer triggers a regulation that

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[1] The government's criterion for distinguishing between government-recognized "religious employers" and merely "eligible organizations" like petitioners is based entirely on its assumption that houses of worship "are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. 39870, 39874 (July 2, 2013).

requires either its insurer or, in the case of a self-insured employer (which many religious employers are), its third party administrator ("TPA") to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39876; see 26 C.F.R. 54.9815–2713AT(b)(2), (c)(2). In other words, unlike the exemption provided to grandfathered plans and religious employers, the "accommodation" does not excuse the employer from ensuring that participants in its plan receive contraceptive coverage in connection with that plan. It instead provides a regulatory mechanism that enables the employer to satisfy both the statutory obligation to provide preventative care and the regulatory obligation to provide contraception coverage, and thereby "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage." 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012).

Originally, objecting nonprofits had only one option for "self-certifying": executing and delivering to its insurer or TPA Employment Benefits Security Administration ("EBSA") Form 700. App.140a. The execution of this document is critical not only to discharging the employer's statutory/regulatory obligation, but also to the actual provision of the objected-to coverage. As the form states on its face, upon execution and delivery, it becomes "an instrument under which the plan is operated." *Ibid.* In particular, it designates the TPA as "plan administrator and claims administrator," not generally, but "solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879; 29 C.F.R. 2510.3–16(b), (c).

That designation is essential because without it, a TPA would have no contractual authority to pay *any* claims (let alone claims for contraceptive coverage excluded from the employer's plan), as a self-insured employer pays claims itself. And under ERISA, self-funded plans can be modified only by a written document. 29 U.S.C. § 1102(a)(1). Accordingly, execution of Form 700 is necessary not only to trigger the regulatory obligation of the TPA to provide contraceptive coverage to the religious organization's employees, but also to "ensure[] that there is a party with legal authority"—both as a contractual matter and for purposes of ERISA liability—to make payments to plan beneficiaries for contraceptive services. 78 Fed. Reg. at 39879. Only if an employer executes an instrument that amends its plan in that manner does a TPA become both obligated and authorized to provide the objected-to coverage, and eligible for 115% reimbursement for the costs of doing so. See 45 C.F.R. 156.50(d)(1)-(3).

The "Augmented" Regulatory Option for Compliance with the Contraceptive Mandate

Unsurprisingly, religious organizations found little solace in a so-called "accommodation" that continues to require them to satisfy their statutory/regulatory obligation to provide the objected-to contraceptive coverage, but allows them to do so by effectively amending their own plans to authorize their own issuers or administrators to provide that coverage, and simply excuses them only from paying for the coverage directly. After all, these organizations do not merely object to paying for or being the direct provider of contraceptive coverage; they object

to taking actions that make them complicit in, or facilitate, access to abortifacients. Filing a form that the government itself deems sufficient to treat the religious employers as providing the coverage required by the statute and regulations certainly supplies a reasonable basis for religious employers to believe that they are at least facilitating the coverage to which they object. Accordingly, several nonprofit religious organizations (including petitioners) brought lawsuits challenging the contraception mandate as applied to nonprofit religious organizations as, among other things, a violation of the Religious Freedom Restoration Act.

When one of those lawsuits reached this Court in the form of an application for an injunction pending appeal, the Court responded by issuing a rare injunction under the All Writs Act excusing the employers from executing Form 700 and instead ordering:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the [ACA] and related regulations pending final disposition of the[ir] appeal.

Little Sisters of the Poor Home for the Aged v. *Sebelius*, 134 S.Ct. 1022 (2014). Because the applicants in that case were self-insured through a church plan, this relief not only prevented them from being forced to execute Form 700, but also has the practical effect

of ensuring that their TPAs would have no legal authority to begin providing the objected-to coverage until their legal challenges were resolved. The Court then proceeded to order extraordinary injunctive relief in *Wheaton College* v. *Burwell*, 134 S.Ct. 2806 (2014).

HHS responded to these orders by revising its regulation in form but not substance, and continuing to require objecting nonprofits to file forms that HHS deems sufficient to put them in compliance with the statutory/regulatory obligation to provide the objected-to contraceptives. Specifically, HHS "augmented" the regulation by allowing an objecting employer to notify HHS of its religious objections instead of executing and delivering Form 700 to its insurer or TPA. Just as with Form 700, however, this notification avenue does not exempt the nonprofit from the contraceptive mandate. Nor does it consist solely of informing HHS of a religious objection. Instead, like Form 700, it serves as "an instrument under which the plan is operated." App.143a.

To that end, the notice must inform HHS of the name and type of the employer's health plan, as well as "the name and contact information for any of the plan's [TPAs]." 79 Fed. Reg. 51092, 51094-95 (Aug. 27, 2014). "If" the religious organization submits this "necessary" information, the government "will send a separate notification to" its insurer or TPA informing of its new "obligations" to provide contraceptive coverage to participants in the organization's plan and its designation as a plan and claims administrator for that purpose only. *Id.* at 51095; 29 C.F.R. 2510.3-16(b). And if the employer takes these steps, it will

ensure that its employees receive no-cost access to the full range of FDA-approved contraceptives under the auspices of its plan, and HHS will deem the employer in compliance with its statutory/regulatory obligation to do just that.

In sum, then, whether an employer executes Form 700 or provides notice to HHS, "[t]he result is the same." App.8a. The religious organization is deemed to comply with the requirement to provide coverage for abortifacients to which it objects; its own healthcare plan becomes the vehicle for facilitating that coverage; and its own certification or notice serves as the legal "instrument" that triggers and authorizes provision of that coverage. Only by taking the affirmative act of executing a legal "instrument" that puts itself in that position can a religious organization avoid massive financial penalties for excluding any FDA-approved forms of contraception from its healthcare plan.

Proceedings Below

1. Petitioners are three nonprofit religious organizations that object to providing certain forms of FDA-approved contraception on religious grounds.

Houston Baptist University ("HBU") and East Texas Baptist University ("ETBU") are Christian liberal arts universities affiliated with the Baptist General Convention of Texas. Dist. Ct. Doc. No. 70-2, Sloan Decl. 2; Dist. Ct. Doc. No. 70-1, Oliver Decl. 2. Their Christian faith permeates everything they do. Both schools are governed by trustees who must, by law, share the schools' understanding of the Christian faith. Sloan Decl. 2-3; Oliver Decl. 3. Both

schools hire only faculty and staff who likewise share their faith. Sloan Decl. 2-3; Oliver Decl. 3; 42 U.S.C. § 2000e-1(a). And while they admit students of all faiths or none, both schools ask their students to live according to a set of Christian principles while enrolled. Sloan Decl. 3; Oliver Decl. 3.

One of those principles is respect for human life. The schools hold traditional Christian beliefs about the sanctity of human life from conception to natural death. Sloan Dec. 3-5; Oliver Decl. 4-6. ETBU's student handbook tells students that the school "supports a culture of life" and seeks to support not only unborn children but also parents facing a crisis pregnancy. Oliver Decl. 5. HBU's Student Code states that the school "cannot support actions which encourage or result in the termination of human life through suicide, euthanasia, or abortion-on-demand," but that "the campus community is prepared to stand with both the father and mother of the unborn child" and help them deal with the unplanned pregnancy in a way that is "supportive and redemptive." Sloan Decl. 4. The schools expect all their faculty to affirm and teach these beliefs, and they expect all their students to live in a way that reflects these beliefs while enrolled. Sloan Decl. 3-4; Oliver Decl. 3, 5.

Westminster Theological Seminary is a nondenominational graduate school in the Presbyterian tradition. Dist. Ct. Doc. No. 75-2, Jue Decl. 2. Westminster's entire curriculum is biblical and theological, and it exists to train adults for Christian ministry. Jue Decl. 2-4. Consistent with this mission, Westminster is governed by trustees, all of whom must be elders in a Presbyterian church. Jue Decl. 3.

All of its faculty and staff must be practicing Christians, and all faculty must assent to the Westminster Larger Catechism, which exhorts Westminster's community to "protect[] and defend[] the innocent," including unborn children. Jue Decl. 4-5. Westminster serves 625 graduate students who have come from around the world to learn about Westminster's Presbyterian faith. Jue Decl. 3-4. For historical and theological reasons, Westminster is independent of any one church or denomination. Dist. Ct. Doc. No. 95-1, Supp. Jue Decl. 1-2.[2]

All three petitioners provide their employees with healthcare plans that reflect their religious commitment to the sanctity of life and the well-being of their campus communities. ETBU is both the sponsor and administrator of its own self-insured plan. Oliver Decl. 7. HBU provides an ERISA-exempt self-insured church plan through GuideStone, which is operated by the Southern Baptist Convention.[3] Sloan Decl. 6.

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[2] Because Westminster is not "operated, supervised, or controlled by" a particular church it does not qualify as an "integrated auxiliary" under a special IRS rule for seminaries. 26 C.F.R. 1.6033-2(h)(5).

[3] A "church plan" is a benefit plan established by a church or association of churches for its employees and employees of organizations that share "common religious bonds and convictions." See 29 U.S.C. § 1002(33). Unless they choose otherwise, church plans are exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2). Although church plans are a form of self-insurance, "self-insured plan" refers here to a self-insured plan that is not a church plan.

Westminster had an insured plan through Independent Blue Cross of Pennsylvania, but switched to GuideStone during the course of this lawsuit. Jue Decl. 7; Westminster C.A. Br. at 15. None of these plans is grandfathered. Because of the schools' religious commitment to the sanctity of life, their plans do not cover surgical abortions or the drugs and devices at issue here. Sloan Decl. 7; Oliver Decl. 7; see Westminster C.A. Br. 15. But all three schools provide no-cost coverage for all other preventive services required under the ACA, including all other FDA-approved contraceptives. *Ibid.*

Petitioners want to continue to offer generous, conscience-compliant health benefits to their employees, but because of the contraceptive mandate, they cannot. Under the contraception mandate, providing the vast majority of FDA-approved contraceptives is not enough. An employer must take steps to make all FDA-approved contraceptives, including those petitioners object to as abortifacients, available to those who obtain healthcare under the plan. As nonprofits, petitioners have an option not available to objecting for-profit corporations, but petitioners view that option (in both its original and "augmented" form) as facilitating access to abortifacients in violation of their religious beliefs. And the government, for its part, views that option as fulfilling petitioners' statutory/regulatory obligation to provide preventative care/contraceptive coverage.

GuideStone is currently a plaintiff in a separate mandate challenge. See *Burwell* v. *Reaching Souls Int'l, Inc.*, No. 14-6028 (10th Cir. argued Dec. 8, 2014).

Although petitioners sincerely believe that this regulatory option for fulfilling the contraceptive mandate is inconsistent with their religious beliefs, their only options are to compromise those beliefs or pay enormous fines. Indeed, since the underlying contraception mandate is the same one that was before this Court in *Hobby Lobby*, the prohibitive fines for non-compliance are also the same. If petitioners fail to comply with the contraceptive mandate, they could face as much as $23.1 million in annual fines, along with potential penalties and lawsuits. Sloan Decl. 13; Oliver Decl. 13-14; Jue Decl. 12.

2. To avoid being put to the impermissible choice of violating their religious beliefs or violating the law, the Universities filed suit on October 9, 2012. Westminster intervened in March 2013. After a lengthy stay to allow the government to change the mandate regulations, the parties filed cross motions for summary judgment. In December 2013, the district court granted petitioners permanent injunctive relief on their RFRA claim. In doing so, Judge Rosenthal rejected the government's argument that complying with the contraception mandate via the regulatory option imposes no burden on petitioners' exercise of religion because, "once the self-certification is completed, the plaintiffs' involvement ends." App.78a. As she instead recognized, it is the very act of self-certifying—"an affirmative act" that petitioners must undertake to achieve compliance with the contraceptive mandate—"that they find * * * to be religiously offensive." App.76a.

Although Judge Rosenthal correctly concluded that "the court cannot second-guess" this "sincerely

held religious belief," App.74a, she also recognized and explained its source: By self-certifying, petitioners ensure that their "employees can obtain [the objectionable] coverage and payment only as long as they are the plaintiffs' employees and on the plaintiffs' group health plan." App.80a. And the government's system relies on "the insurance plan that the religious-organization employer put into place, the issuer or TPA the employer contracted with, and the self-certification form the employer completes and provides the issuer or TPA, that enable the employees to obtain the free access to the contraceptive devices that the plaintiffs find religiously offensive." *Ibid.* It is in these respects that the "affirmative act" of self-certification (or notice) forces petitioners to facilitate contraceptive coverage in violation of their sincerely held religious beliefs. And by forcing religious objectors to perform that "affirmative act" or face millions of dollars in fines, the government has imposed a substantial burden on petitioners' exercise of their religious beliefs. See App.81.

Having concluded as much, Judge Rosenthal turned to whether the regulatory option available to nonprofits is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Finding that the government could achieve the same end by, among other things, "provid[ing] the contraceptive services or coverage directly to those who want them but cannot get them from their religious-organization employers," she concluded that it is not. App.84a.

3. The government appealed, and the Fifth Circuit reversed.[4] According to the Fifth Circuit, even though there is no dispute that petitioners sincerely believe that complying with the contraceptive mandate via the regulatory option would violate their religious beliefs, and even though there is no dispute that petitioners would face enormous fines if they refuse to do so, the requirement to comply nonetheless imposes no "substantial burden" on petitioners' exercise of religion. App.18a. The court reached that conclusion by reasoning that petitioners are simply wrong to believe that the regulatory option for complying with the contraceptive mandate forces them to "facilitat[e] access to contraceptives." App.18a-23a. Accordingly, the court never reached the question of whether that option is the least restrictive means of achieving a compelling government interest.

REASONS FOR GRANTING THE PETITION

I. This case presents an exceptionally important question.

This case presents a question of profound and nationwide importance. There is no dispute that thousands of religious organizations throughout the country sincerely believe that complying with the mandate that they provide healthcare coverage that includes abortifacients and contraceptives, either di-

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[4] The Fifth Circuit consolidated petitioners' appeals with three other government appeals of district court decisions holding the "accommodation" inconsistent with RFRA; the plaintiffs in those appeals are not parties to this petition. App.3a.

rectly or via the "accommodation" HHS has offered them, violates their religious beliefs. And there is no dispute that unless these religious employers comply with that mandate, they will face massive financial penalties. In short, there is no dispute that employers ranging from religious schools to faith-based charities to orders of nuns are being forced to choose between violating their sincere religious beliefs or violating federal law.

Understandably, this unprecedented situation has generated a nearly unprecedented volume of litigation. Indeed, hundreds of religious institutions representing a wide cross-section of organizations and faiths have brought lawsuits, some on behalf of entire classes of affected religious employers, seeking relief from the untenable position in which HHS has put them.[5] None of this should be surprising. Traditionally, the government has steered clear of mandating coverage as religiously sensitive as contraception and abortifacients, and has provided generous conscience clauses when mandates threaten to intrude upon religious beliefs. As a result, religious organizations were free to decide for themselves how to provide their employees with healthcare plans that comply with their religious beliefs.

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[5] See Becket Fund for Religious Liberty, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/; National Women's Law Center, *Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit*, http://www.nwlc.org/sites/default/files/pdfs/contraceptive_coverage_litigation_status_6-24-15_finalv2.pdf.

The promulgation of a regulatory mandate that a wide swath of employers including religious orders and colleges must provide healthcare coverage that includes contraception and abortifacients changed all that. Religious employers made it perfectly clear to HHS that compliance with this unprecedented regulatory mandate would violate their sincerely held beliefs. Yet HHS nonetheless refused to exempt them, even though thousands of other employers have been exempted for reasons ranging from religious conscience to administrative convenience. Instead, HHS offered only an alternative avenue for those employers to *comply* with the mandate to provide the coverage that HHS desires and that the employers' religions forbid. Religious employers once again made perfectly clear that providing such coverage, whether directly or via this so-called "accommodation," would violate their religious principles. It thus should not come as a surprise that HHS's unprecedented mandate generated unprecedented litigation seeking to vindicate the free exercise of religion.

Many of these lawsuits, including this one, met with success in the district courts and the government appealed. But in contrast to the district courts that found a RFRA violation based on a straightforward application of *Hobby Lobby*, the Third, Fifth, Seventh, and D.C. Circuits concluded that forcing religious employers to comply with the contraception mandate via the nonprofit regulatory option does not violate RFRA. And to make matters worse, they have done so by employing a form of substantial burden analysis that is virtually identical to the reasoning that this Court squarely rejected in *Hobby Lobby* and a long line of cases before it. See *infra* Part II. Those

circuit decisions are profoundly flawed, but what matters at this juncture is not who is correct about the ultimate merits of this important and recurring nationwide controversy. Instead, what matters now is that, as a consequence of final decisions like the one below, religious employers throughout the nation face the imminent prospect of being forced to choose between taking an action that they sincerely believe will violate their religious beliefs or violating the ACA.

That is reason enough for this Court to intervene now, rather than allowing this exceptionally important question to "percolate" while employers face the abandonment of the free exercise rights that RFRA guarantees. Indeed, this Court has already recognized—repeatedly—that this extraordinary situation demands extraordinary action. Three times, the Court has been asked to provide extraordinary relief under the All Writs Act to prevent an employer from being forced to comply with contraceptive mandate through HHS's "accommodation" before exhausting all avenues of judicial review. And three times, this Court has complied, first by granting an injunction pending appeal in *Little Sisters*, then by doing the same in *Wheaton College*, and most recently by granting an injunction pending resolution of a petition for certiorari challenging HHS's "augmented" "accommodation" in *Zubik* v. *Burwell*, 576 U.S. ---, 2015 WL 3947586 (June 29, 2015). As the Court has thus recognized, the stakes are simply too high to allow the government to begin enforcing its novel regu-

latory scheme before the legality of that scheme has been fully and finally litigated.[6]

And as this case confirms, the time for this Court to play its essential role in that process is now. The arguments for each side have been exhaustively briefed, and petitioners' RFRA claims have been finally resolved by the courts below, with the District Court granting them a permanent injunction and the Fifth Circuit reversing. Accordingly, unless petitioners receive relief from this Court, they are out of options; they will be forced to choose between compliance with the contraceptive mandate via one of the avenues HHS has offered or compliance with their religious beliefs. And that situation is not unique to petitioners; several religious organizations have now litigated their claims to final judgment without receiving relief from the courts of appeals. Unless this Court intervenes now, a decision on the merits will come too late to save these organizations from making the very choice that RFRA is supposed to protect them from in all but the narrowest of circumstances. This Court should not let that extraordinary result come to pass without deciding for itself whether HHS's unprecedented effort to force religious organi-

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[6] This Court has also twice granted, vacated, and remanded pre-*Hobby Lobby* decisions rejecting challenges to the nonprofit regulation, indicating a "reasonable probability that th[ose] decision[s] * * * rest[] upon a premise" that should be "reject[ed]" in light of subsequent authority, *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). See *Univ. of Notre Dame* v. *Burwell*, 135 S.Ct. 1528 (2015); *Michigan Catholic Conference* v. *Burwell*, 135 S.Ct. 1914 (2015).

zations to take actions that HHS itself considers sufficient to comply with a mandate to provide contraceptive coverage that they find objectionable on religious grounds can be reconciled with Congress' stringent protection of the free exercise of religion.

II. The court of appeals' failure to find a substantial burden on religious exercise is exceptionally wrong.

This Court's immediate intervention is all the more essential because the decision below is profoundly wrong. Indeed, the reasoning the Fifth Circuit employed in concluding that the government has not imposed a substantial burden on petitioners' exercise of religion is impossible to reconcile with the reasoning this Court employed in *Hobby Lobby* and decades of substantial burden cases before it.

As noted, there is no dispute that petitioners sincerely believe that complying with the contraceptive mandate via the regulatory option requires them to facilitate access to contraceptive coverage in violation of their religious beliefs. And there is no dispute that failure to comply with the contraceptive mandate through one of the avenues HHS has offered will result in massive financial penalties. As the District Court correctly recognized, that should have been the end of the substantial burden analysis, as forcing petitioners to choose between taking an action that they sincerely believe would violate their religion or "pay[ing] an enormous sum of money" "clearly imposes a substantial burden on" their exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2779. That is so whether or not courts *agree* with petitioners that the action in question would violate their religious beliefs, as

courts simply do not have the authority to "second-guess" a sincerely held religious belief. App.74a.

Yet that is precisely what the Fifth Circuit did in concluding that the government has not imposed a substantial burden on petitioners' exercise of religion. The court did not dispute that petitioners sincerely believe that each of the avenues through which HHS allows them to comply with the contraceptive mandate would force them to facilitate contraceptive coverage in violation of their religious beliefs, or that the consequences of non-compliance—namely, massive penalties—are "draconian." App.5a. Instead, the court of appeals insisted that the substantial burden analysis turns not on whether petitioners are being pressured to *comply* with a law that they find objectionable on religious grounds, but rather on whether petitioners are correct in their belief that by being pressured to comply with that law, they are really being "pressured * * * to facilitate the use of contraceptives." App.17a. The court rejected petitioners' RFRA claims by reasoning that petitioners are simply wrong to believe that "the acts *they* are required to perform" under the regulatory option are tantamount to "providing or facilitating access to contraceptives." App.18a.

That reasoning is impossible to reconcile with this Court's substantial burden jurisprudence. This Court admonished decades ago that "it is not within the judicial function and judicial competence to inquire whether" someone who sincerely objects to a law on religious grounds has "correctly perceived the commands of [his] faith." *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981). After all, "[c]ourts are not arbi-

ters of scriptural interpretation," and they are "singularly ill equipped" to make sensitive decisions about what does or does not interfere with religious beliefs—*e.g.*, whether the degree of complicity required is religiously problematic. *Ibid.* Instead, the only questions for the courts to resolve in the substantial burden analysis are whether a religious belief is sincerely held and, if so, whether the "pressure" the government has "put[] * * * on an adherent to modify his behavior and to violate his beliefs" is "substantial." *Id.* at 718; see also *United States* v. *Lee*, 455 U.S. 252, 257 (1982).

To the extent there was any doubt on that score, *Hobby Lobby* eliminated it. Just as in this case, "HHS's main argument" concerning the substantial burden inquiry in *Hobby Lobby* "[wa]s basically that the connection between what the objecting parties must do * * * and the end that they find to be morally objectionable * * * [wa]s simply too attenuated." 134 S.Ct. at 2777. Rather than resolve that argument as part of its substantial burden analysis, the Court made clear that it was entirely misplaced, as it "addresses a very different question that the federal courts have no business addressing," and that the Court itself has "repeatedly refused" to answer. *Id.* at 2778 (collecting cases). The "difficult and important question" of whether "the line" someone draws in determining what actions are "consistent with his religious beliefs"—including how much facilitation or complicity is too much—is instead a line for the religious adherent alone to draw. *Ibid.* The only questions the Court found relevant to its substantial burden analysis were whether "the line drawn" by the challengers "reflect[ed] an honest conviction" and, if

so, whether the government had substantially pressured them to cross that line. *Ibid.* And as the Court went on to conclude, putting employers to the choice of crossing that line or "pay[ing] an enormous sum of money" unquestionably does substantially pressure them to cross that line. *Id.* at 2779.

As several judges—including Judge Rosenthal below—have recognized, that same reasoning compels the conclusion that the nonprofit regulation imposes a substantial burden on religious exercise. As Judge Pryor has explained, "[s]o long as the [religious organization's] belief is sincerely held and undisputed—as it is here—we have no choice but to decide that compelling the participation of the [religious organization] is a substantial burden on its religious exercise." *Eternal Word Television Network, Inc.* v. *Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., specially concurring). Judges Kavanaugh and Brown likewise recently emphasized the "bedrock principle" of *Thomas* and *Hobby Lobby* "that we may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs—including about complicity in wrongdoing." *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. 10 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc); see also *id.* at 6-7 (Brown, J., dissenting from denial of rehearing en banc). And as Judge Flaum aptly put it, whether the regulatory option available to nonprofits forces them to facilitate access to contraceptive coverage "is not a question of legal causation but of religious faith. Notre Dame tells us that Catholic doctrine prohibits the action that the government requires it to take. So

long as that belief is sincerely held, I believe we should defer to Notre Dame's understanding." *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), vacated and remanded, 135 S.Ct. 1528 (2015).

Unfortunately, when it comes to challenges to the contraceptive mandate by nonprofit religious employers, adherence to the clear teachings of *Hobby Lobby* and *Thomas* has become a feature more common to dissenting opinions than majorities. Indeed, each of the four courts of appeals that have resolved such challenges (including the Fifth Circuit here) has employed a substantial burden analysis more reminiscent of the approach advanced by the dissenters in *Hobby Lobby*. See *Hobby Lobby*, 134 S.Ct. at 2799 (Ginsburg, J., dissenting) (finding no substantial burden because there were "independent decisionmakers * * * standing between the challenged government action and the religious exercise claimed to be infringed").

For instance, in *Geneva College* v. *Secretary of United States Department of Health & Human Services*, 778 F.3d 422 (3d Cir. 2015), the Third Circuit first erroneously concluded that RFRA requires courts to "objectively assess whether the appellees' compliance with the self-certification procedure does, in fact * * * make them complicit" in facilitating religion, then drew its own conclusion that the procedure does not. *Id.* at 435. Likewise, the Seventh Circuit has adamantly insisted both that it "is for the courts to determine whether the law actually forces [employers] to act in a way that would violate [their] beliefs," *Univ. of Notre Dame* v. *Burwell*, 786 F.3d 606,

611-12 (7th Cir. 2015) (Posner, J.) *("Notre Dame II")*, and that religious employers are wrong to believe that it does, see *Wheaton College* v. *Burwell*, --- F.3d --, No. 14-2396, 2015 WL 3988356, at *7 (7th Cir. 2015) (Posner, J.) ("No one is asking Wheaton to violate its religious beliefs."). And the D.C. Circuit dismissed the employers' RFRA objections by reasoning that the nonprofit regulation requires them to do nothing more than complete "a bit of paperwork" that "wash[es] their hands of any involvement in providing insurance coverage for contraceptive services." *PFL*, 772 F.3d 229, 237, 247 (D.C. Cir. 2014).

Like the decision below, those cases simply cannot be reconciled with this Court's repeated admonishment that "it is not within 'the judicial function and judicial competence'" to decide whether a religious adherent has "correctly perceived the commands of [his] faith." *Lee*, 455 U.S. at 257 (quoting *Thomas*, 450 U.S. at 716). Indeed, just this past Term, applying RLUIPA's identical substantial burden test, this Court found it sufficient that an inmate demonstrated that he would "face serious disciplinary action" if forced to shave a beard that he sincerely believed his religion required him to maintain. *Holt* v. *Hobbs*, 135 S.Ct. 853, 862 (2015). In doing so, the Court spent no time evaluating whether maintaining a half-inch beard was really necessary or sufficient to comply with a "dictate of [petitioner's] religious faith." *Ibid.* Nor did it focus on the fact that shaving takes only a few minutes. Instead, it was enough that petitioner's belief was sincere, and that the government had placed substantial pressure on him to violate it.

So, too, here. Thousands of religious employers throughout the nation sincerely believe that complying with the nonprofit regulations involves a degree of facilitation or complicity that would violate their religious beliefs, and there is no question that the consequences of declining to pursue the "accommodation" route for fulfilling the contraceptive mandate are "draconian." App.5a. Indeed, the ultimate regulatory mandate at issue here—the contraceptive mandate—is the exact same one that was at issue in *Hobby Lobby*, and the fines for noncompliance are identical as well. The only difference is that HHS has given petitioners an option for fulfilling the mandate that was not offered to for-profit corporations like Hobby Lobby.

But as long as the proffered means of fulfilling the contraceptive mandate violate sincerely held religious beliefs, then the existence of a substantial burden follows ineluctably from *Hobby Lobby*. Just as in *Hobby Lobby*, the government has "demand[ed] that [employers] engage in conduct that seriously violates their religious belief[s]" on pain of "substantial economic consequences." *Hobby Lobby*, 134 S.Ct. at 2776. And just as in *Hobby Lobby*, that economic pressure "clearly imposes a substantial burden on those beliefs." *Id.* at 2779. In fact, the substantial economic consequences are exactly the same, because the ultimate mandate is exactly the same. Perhaps courts could conclude that the existence of additional regulatory means of compliance with the contraceptive mandate alters the least restrictive means analysis. But if the additional regulatory means violate sincerely held religious beliefs, then *Hobby Lobby* controls the substantial burden inquiry. That the

Fifth Circuit (and others) failed to recognize as much is proof enough of the need for this Court's intervention.

And to make matters worse, courts not only have impermissibly arrogated to themselves the authority to answer "a difficult and important question of religion and moral philosophy," *id.* at 2778, but have failed to grasp the true nature of the religious objections that employers are raising. These cases are not about whether the government can force religious employers to execute a "bit of paperwork." *PFL*, 772 F.3d at 237. Nor are they about whether religious employers have a right to prevent their employees from receiving access to coverage for the objected-to contraceptives. Rather, they are about whether the government may force religious employers, contrary to their religious convictions, to comply with a mandate to provide contraception coverage to their employees in a way that is "seamless" and ultimately involves the provision of contraceptive coverage via the religious employers' own plans.

The government would seem to be poorly positioned to question that its regulatory option involves a meaningful degree of complicity or facilitation. After all, HHS does not view its "accommodation" as an exemption from the requirement that petitioners provide a qualifying healthcare plan that includes the mandated contraceptives and abortifacients. Instead, the required paperwork is viewed as a means of complying with the contraceptive mandate, which ultimately flows from a statutory requirement. Having concluded that its accommodation is good enough (as a matter of administrative law) to put petitioners

in compliance with their regulatory and statutory obligations to provide no-cost contraceptive coverage, it takes real chutzpah for the government to then insist that this same accommodation involves no meaningful facilitation or complicity in the provision of those contraceptives and abortifacients. It is all well and good for the government to think *it* has threaded the needle and found a way for religious nonprofits to comply with the contraceptive mandate without violating their religious beliefs, but ultimately it is for the religious adherent to determine how much facilitation or complicity is too much.

Just like its need to ensure that its "accommodation" complies with the ACA, the government's need to ensure that its "accommodation" complies with ERISA (as well as the APA) likewise ensures that the degree of complicity and facilitation is substantial. That much is clear from the fact that the form or notice HHS requires employers to execute serves as "an instrument under which [its healthcare] plan is operated." App.143a. That instrument is essential to "ensure[] that there is a party with legal authority" to make payments for contraceptive services, 78 Fed. Reg. at 39880, as a TPA would have no contractual authority to pay claims without it. It is the "affirmative act" of executing that instrument—not the independent actions of any third parties—that petitioners sincerely believe would violate their religious beliefs. App.76a. The situation thus is not meaningfully different from one in which the government mandates that all hospitals perform abortions, but purports to "accommodate" religious hospitals by requiring them to sign a form authorizing doctors supplied and paid by the government to perform abortions on their

premises. It is not hard to see why a hospital would find little solace in the government's assurances that it is not "facilitating" abortion because its own doctors are not the ones that the hospital has authorized to use its facility to perform abortions.

As the foregoing confirms, the Fifth Circuit was simply wrong to insist that availing themselves of HHS's regulatory option for compliance with the contraceptive mandate would not require petitioners to "facilitat[e] access to contraceptives." App.18a. Indeed, as Judge Kavanaugh pointedly asked, "if the form were meaningless, why would the government require it?" *PFL*, slip op. 12, (Kavanaugh, J., dissenting). The answer is obvious: because it is not meaningless at all, but rather is essential to the operation of HHS's scheme for ensuring that nonexempt employers comply with the contraceptive mandate.

But ultimately, who has the better of the complicity and facilitation arguments is beside the point. What matters under RFRA and this Court's cases is that petitioners *sincerely believe* that complying with the contraceptive mandate via the nonprofit regulation would violate their religious beliefs, and that the government nonetheless is exerting substantial economic pressure—the exact same pressure as in *Hobby Lobby*—on petitioners to do so. The substantial burden analysis requires nothing more.

III. Under a correct application of well-established precedent, the "accommodation" option for satisfying the contraceptive mandate clearly fails RFRA's least restrictive means test.

In employing a fundamentally flawed substantial burden analysis, the Fifth Circuit avoided the only substantial question left open by *Hobby Lobby*—whether the regulatory "accommodation" available to nonprofits for satisfying the contraceptive mandate satisfies RFRA's least restrictive means analysis. In reality, that regulatory option cannot possibly withstand scrutiny under that "exceptionally demanding" standard. *Hobby Lobby*, 134 S.Ct at 2780. Indeed, many of the judges who have actually reached the question of whether the regulation is "the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. § 2000bb-1, have had little trouble concluding that it is not. See, *e.g.*, *EWTN*, 756 F.3d at 1349 (Pryor, J., concurring); *PFL*, slip op. 17 (Brown, J., dissenting); *id.* at 23 (Kavanaugh, J., dissenting), *Notre Dame II*, 786 F.3d at 629-30 (Flaum, J., dissenting).

And with good reason, as the government has "many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors," *Korte* v. *Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013), including by, among other things, "provid[ing] the contraceptive services or coverage directly to those who want them but cannot get them from their religious-organization employers." App.84a. Most obviously, the government could simply "treat employees [of religious objectors]

* * * the same as it does employees whose employers provide no coverage" by "providing for subsidized * * * contraceptive coverage * * * on [the] exchanges." *PFL*, slip op. 17 (Brown, J., dissenting). The government has barely even attempted to show that it gave the requisite "serious, good faith consideration," *Fisher* v. *Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2420 (2013), to these alternatives before proceeding with its preferred course of enlisting petitioners in its efforts to provide their employees with contraceptive coverage.

Moreover, as several courts recognized when considering challenges to the contraceptive mandate by for-profit corporations before *Hobby Lobby*, it is hard to see how the government can claim a "compelling interest" in enforcing a mandate that, as a consequence of its own actions, "does not apply to tens of millions of people * * * includ[ing] those working for private employers with grandfathered plans, for employers with fewer than fifty employees," and for certain religious employers. *Hobby Lobby*, 723 F.3d at 1143-44; see also *Korte*, 735 F.3d at 686; *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1222 (D.C. Cir. 2013) vacated and remanded, 134 S.Ct. 2902 (2014); *EWTN*, 756 F.3d at 1351 (Pryor, J., concurring). Although this Court found no need to resolve the question in *Hobby Lobby*, it, too, noted that "it is arguable that there are features of the ACA that support th[e] view" that the contraceptive mandate does not serve a compelling government interest. 134 S.Ct. at 2780; see *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993) ("'[A] law cannot be regarded as protecting an interest "of the highest order" * * * when it leaves

appreciable damage to that supposedly vital interest unprohibited.'").

To the extent courts have concluded otherwise, once again they have done so only by employing reasoning that this Court affirmatively rejected in *Hobby Lobby*. In *Priests for Life*, for instance, the D.C. Circuit concluded that forcing religious employers to comply with the contraceptive mandate via the "accommodation" furthers the government's compelling interests in "improving public health" and "assuring women equal benefit[s]." 772 F.3d at 259, 262; accord *Notre Dame II*, 786 F.3d at 624 (Hamilton, J., concurring); *Korte*, 735 F.3d at 724 (Rovner, J., dissenting). But as this Court admonished in rejecting those same generic interests in *Hobby Lobby*, RFRA "contemplates a 'more focused' inquiry" that "requires" courts "to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases." 134 S.Ct. at 2779 (quoting *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)); accord *Holt*, 135 S.Ct. at 863; *Korte*, 735 F.3d at 686 (articulating a compelling interest as general as "public health" or "gender equality" "seriously misunderstands strict scrutiny").

Once again, the government has barely even tried to satisfy the compelling interest test at the level of specificity that this Court's precedents demand. Instead, it has been content to rely on little more than "data" showing that women "generally" benefit from access to contraceptives and sheer speculation that

the female employees of nonexempt religious employers are more likely than "church[] employees" to do so. *PFL*, 772 F.3d at 265-66. Surely "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), demands more than that. Indeed, the government's arguments do not even speak to whether it has a compelling interest in forcing an employer that, like petitioners, already covers most contraceptives to also facilitate access to the narrow category of contraceptives that it objects to on religious grounds.

Moreover, the government has admitted that it has *no interest* in enforcing the mandate against organizations that, like petitioners, hire only persons of the same faith. According to the government, it "does not undermine the governmental interests furthered by the contraceptive coverage requirement" to exempt houses of worship because they "are more likely" to hire coreligionists that share their objections. 78 Fed. Reg. at 39874. But that is exactly what petitioners do: They hire people of the same faith who share the same objection. App.37a-38a. Thus, by the government's own logic, exempting petitioners from the contraceptive mandate would "not undermine the governmental interests." 78 Fed. Reg. at 39874.[7]

In short, the government simply cannot bear its burden of proving that forcing religious employers to

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[7] Even if it did, moreover, the government has no legitimate interest here in discriminating between houses of worship and other religious organizations. See *Larson* v. *Valente*, 456 U.S. 228, 246-47 & n.23 (1982).

comply with the contraceptive mandate via the "accommodation" is the least restrictive means of furthering a compelling government interest. That makes this Court's review all the more essential, as the Fifth Circuit effectively dodged this issue by failing to employ the substantial burden test that this Court's precedents demand. It is bad enough that the government's unprecedented effort to force religious employers to take actions that violate their sincerely held religious beliefs escaped meaningful RFRA review in the Fifth Circuit. Petitioners should not be denied meaningful review in this Court as well before being forced to make the untenable choice that HHS has thrust upon them.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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JULY 2015

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued April 7, 2015 Decided June 22, 2015

No. 14-20112

EAST TEXAS BAPTIST UNIVERSITY;
HOUSTON BAPTIST UNIVERSITY,
PLAINTIFFS-APPELLEES,

WESTMINSTER THEOLOGICAL SEMINARY,
INTERVENOR PLAINTIFF-APPELLEE,

v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,

DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Southern District of Texas (No. 4:12-cv-03009)

NO. 14-10241

UNIVERSITY OF DALLAS,
PLAINTIFF-APPELLEE,
v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Northern District of Texas (No. 4:12-cv-00314)

NO. 14-40212

CATHOLIC DIOCESE OF BEAUMONT;
CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INC.
PLAINTIFFS-APPELLEES,
v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of

the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Eastern District of Texas (No. 4:12-cv-00709)

NO. 14-10661

CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INC.,
PLAINTIFF-APPELLEE,

v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Northern District of Texas (No. 4:12-cv-00314)

Before: REAVLEY, SMITH and GRAVES, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*: In these consolidated appeals, religious organizations challenge, under the Religious Freedom Restoration Act ("RFRA),[1] a requirement that they either offer their employees health insurance that covers certain contraceptive services or submit a form or notification declaring their religious opposition to that coverage. The district courts held that the requirement violates RFRA or, in one case, that the plaintiffs had demonstrated a substantial likelihood of establishing that it does, so they enjoined the government from enforcing it. Because the plaintiffs have not shown and are not likely to show that the requirement substantially burdens their religious exercise under established law, we reverse.

I.

A.

Under the Affordable Care Act ("ACA"),[2] employers with fifty or more full-time employees generally must offer their employees a group health plan[3] that provides "minimum essential coverage."

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[1] 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[3] The term "group health plan" includes both insured plans, in which an insurer writes a policy and bears the risk of claims, and self-insured plans, in which the employer bears the risk but may contract with a third-party administrator to perform administrative tasks such as processing claims.

See 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2). Plans typically must cover all FDA-approved contraceptive methods and sterilization procedures for women[4] without copayments or deductibles.[5] Two types of plans are automatically exempt from the so-called contraceptive mandate: grandfathered plans, meaning those that have not made certain specified changes since March 2010, *see* 42 U.S.C. § 18011(a), and plans offered by religious employers, defined by reference to the Tax Code to include mostly churches themselves, as distinguished from associated educational or charitable institutions.[6] An employer that does not comply with these requirements faces draconian penalties: $2,000 per full-time employee per year for not offering a plan at all[7] and $100 per affected individual per day for offering a plan that provides insufficient coverage, 26 U.S.C. § 4980D(a), (b)(1).

An "accommodation" is available to religious entities that do not qualify as religious employers but seek exemption from the mandate. To avail itself of

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[4] We refer to the contraceptive methods and sterilization procedures collectively as "contraceptives" unless otherwise indicated.

[5] *See* 42 U.S.C. § 300gg-13(a)(4); Group Health Plans and Health Insurance Insurers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012).

[6] *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

[7] 26 U.S.C. § 4980H(a), (c)(1). The penalty applies if at least one employee enrolls in a subsidized plan through an exchange. *See id.* § 4980H(a)(2).

that option, (1) an organization must oppose, on religious grounds, providing coverage for some or all contraceptives; (2) it must be organized as a nonprofit; (3) it must hold itself out as religious; and (4) it must certify that it satisfies the foregoing criteria.[8] It can certify in two ways.

The first way is to complete EBSA[9] Form 700 and send it to its insurer or third-party administrator.[10] The person signing the form must certify that the organization meets the requirements and that the form is believed to be correct.[11] The form requires the name of the organization, the name and title of the person signing it, and contact information. DEP'T OF LABOR, *supra* note 11, at 1. The second way in which an organization can certify is to submit a notice to the Department of Health and Human Services ("HHS").[12] The notice need not take a particular form but must include the name of the organization; a statement that it opposes, on religious grounds, providing coverage for some or all contraceptives; the name and type of the plan; and the name and contact information of the plan's

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[8] 26 C.F.R. § 54.9815-2713A(a); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b).

[9] "EBSA" stands for "Employee Benefits Security Administration," which is part of the Department of Labor.

[10] 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(c)(1).

[11] DEP'T OF LABOR, EBSA FORM 700 1 (2014), http://www.dol.gov/ebsa/- preventiveserviceseligibleorganizationcertificationform.doc.

[12] 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(c)(1).

insurer or third-party administrator, if applicable.[13]

The effect of applying for the accommodation depends on the type of plan and method of certification. If an employer with an insured plan uses Form 700, the insurer must exclude the objectionable coverage from the plan and provide "separate payments" for contraceptives for plan participants.[14] The insurer may not impose any direct or indirect costs for contraceptives on the employer or participants.[15] In addition, it must send a notice to participants, separately from plan materials, explaining that the employer does not administer or fund contraceptives but that, instead, the insurer provides separate payments.[16] If an employer with an insured plan submits a notice to HHS, then HHS notifies the insurer of its obligations, which are the same as if the employer had used Form 700.[17]

The process for self-insured plans is somewhat different. If an employer with a self-insured plan uses Form 700, the third-party administrator, if there is one, must either provide separate payments

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[13] *See* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii).

[14] 29 C.F.R. § 2590.715-2713A(c)(2)(i); 45 C.F.R. § 147.131(c)(2)(i).

[15] 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii)

[16] 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

[17] *See* 29 C.F.R. § 2590.715-2713A(c)(1)(ii), (2)(i); 45 C.F.R. § 147.131(c)(1)(ii), (2)(i).

(as an insurer would) or arrange for an insurer or other entity to do so. *See* 29 C.F.R. § 2590.715-2713A(b)(2). Third-party administrators and insurers that pay for contraceptives in this circumstance are eligible for government reimbursement of 115% of their expenses.[18] The prohibition on imposing costs and the notice requirement are the same as for insured plans.[19] Moreover, the form "shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for [contraceptives], and shall supersede any earlier designation." *Id.* § 2510.3-16(b).

If an employer with a self-insured plan submits a notice to HHS, then HHS notifies the Department of Labor, which in turn notifies the third-party administrator of its obligations. *See id.* § 2590.715-2713A(b)(1)(ii)(B). The result is the same as if the employer had used Form 700, *id.* § 2590.715-2713A(b)(1)(ii)(B), (2), except that it is the notice from the Department of Labor, instead of Form 700, that is treated as an instrument under which the plan is operated and as designation of the plan administrator, *id.* § 2510.3-16(b).

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[18] 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d); Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13744, 13809 (Mar. 11, 2014).

[19] *See* 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(b)(2), (d).

B.

The plaintiffs are religious organizations that oppose the use of some or all contraceptives. The sincerity of their beliefs is undisputed. The Dioceses of Fort Worth and Beaumont are automatically exempt from the mandate as religious employers, and the other plaintiffs are eligible for the accommodation.

The plaintiffs in *East Texas Baptist University* are East Texas Baptist University and Houston Baptist University, which have self-insured plans[20] for their employees, and Westminster Theological Seminary, which offers an insured plan to its employees. Houston Baptist University's plan is a church plan, which is exempt from ERISA. The plaintiffs oppose abortion and believe that emergency contraceptives and intrauterine devices, which are included in the contraceptive mandate, can cause abortions. They are unwilling to provide or facilitate access to those products. They sued in the Southern District of Texas, and the court entered partial final judgment[21] and a permanent injunction against the government.

The plaintiffs in *University of Dallas*[22] are several Catholic organizations. The University of Dallas has a self-insured plan for its employees and an insured plan for its students. The Diocese of Fort Worth

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[20] All self-insured plans at issue in these appeals have third-party administrators.

[21] The court stayed other claims not at issue on appeal.

[22] The *University of Dallas* and *Diocese of Fort Worth* appeals arise from the same district-court case. We refer to those appeals collectively as "*University of Dallas*."

provides coverage to its employees through a church plan, and Our Lady of Victory Catholic School offers coverage to its employees through the diocese's plan.[23] Catholic Charities, Diocese of Fort Worth, has an insured plan for its employees. The plaintiffs oppose the use of any contraceptives to prevent pregnancy or induce abortion,[24] and providing or facilitating access to them for those purposes would violate their faith. They sued in the Northern District of Texas, and the court entered preliminary injunctions against the government.

The plaintiffs in *Diocese of Beaumont* are the Diocese of Beaumont, which provides coverage to its employees through a church plan, and Catholic Charities of Southeast Texas, which offers coverage to its employees through the diocese's plan.[25] Like the plaintiffs in *University of Dallas*, they oppose the use of any contraceptives to prevent pregnancy or induce abortion, and they object to providing or facilitating access to them for those purposes. They

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[23] The diocese is automatically exempt from the mandate as a religious employer, but Our Lady of Victory is not. The diocese is a plaintiff because it alleges that the regulations will require it either to sponsor a plan that complies with the mandate or to remove Our Lady of Victory from its plan.

[24] The Catholic plaintiffs do not oppose the use of contraceptives to treat medical conditions so long as the purpose is not to prevent pregnancy or induce abortion.

[25] As with the Diocese of Fort Worth and Our Lady of Victory, the diocese is automatically exempt from the mandate as a religious employer, but Catholic Charities is not. The diocese is a plaintiff because it alleges that the regulations will require it either to sponsor a plan that complies with the mandate or to remove Catholic Charities from its plan.

sued in the Eastern District of Texas, and the court entered final judgment and a permanent injunction against the government.

II.

We review a summary judgment *de novo*. *LaBarge Pipe & Steel Co. v. First Bank*, 550 F.3d 442, 449 (5th Cir. 2008). We review the grant of a preliminary or permanent injunction for abuse of discretion and the underlying legal conclusions *de novo*.[26]

III.

Under RFRA, the "[g]overnment shall not substantially burden a per- son's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a) to (b). We begin and end our analysis with the substantial-burden prong.[27] The plaintiffs

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[26] *See Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 528 (5th Cir. 2013) (en banc) (permanent injunction), *cert. denied*, 134 S. Ct. 1491 (2014); *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195 (5th Cir. 2003)

[27] Westminster claims that the government waived its argument on this issue by failing to present it to the district court. We disagree. The government explained at length why it believes that the regulations do not substantially burden the plaintiffs' religious exercise.

must show that the challenged regulations substantially burden their religious exercise,[28] but they have not done so or, in *University of Dallas*, have not established a substantial likelihood of doing so. Because their claims fail on the merits, we need not consider the other requirements for an injunction.[29]

A.

A preliminary question—at the heart of this case—is the extent to which the courts defer to a religious objector's view on whether there is a substantial burden. The inquiry has three components: (1) What is the adherent's religious exercise? (2) Does the challenged law pressure him to modify that exercise?

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[28] *See City of Boerne*, 521 U.S. at 533–34 (noting that the burden is on the religious objector); *Diaz v. Collins*, 114 F.3d 69, 71–72 (5th Cir. 1997) (same).

[29] "To be entitled to a preliminary injunction, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *Lake Charles Diesel*, 328 F.3d at 195–96. "[A] plaintiff seeking a permanent injunction must . demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

(3) Is the penalty for noncompliance substantial? It is well established that the court accepts the objector's answer to the first question upon finding that his beliefs are sincerely held and religious.[30] It is also undeniable that the court evaluates the third question as one of law.[31] Although we have not directly addressed who decides the second question,[32] all of our sister circuits that have considered contraceptive-mandate cases have come to the same conclusion: The court makes that decision.[33] We

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[30] *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777–79 (2014); *Thomas v. Review Bd.*, 450 U.S. 707, 713–16 (1981).

[31] *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2775–77; *Sherbert v. Verner*, 374 U.S. 398, 403–06 (1963).

[32] East Texas Baptist University cites two Fifth Circuit cases applying the Texas version of RFRA, but those decisions merely confirmed that the court defers to the adherent's answer to the first question upon finding that his beliefs are sincerely held and religious. *See A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 263–66 (5th Cir. 2010); *Merced v. Kasson*, 577 F.3d 578, 590–91 (5th Cir. 2009).

[33] *See Univ. of Notre Dame v. Burwell*, No. 13-3853, 2015 WL 2374764, at *6 (7th Cir. May 19, 2015) ("Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs."); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir.) ("Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive cover- age."), *mandate recalled and stayed sub nom. Zubik v. Burwell*, 135 S. Ct. 1544 (2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014) ("Accepting the sincerity of Plaintiffs' beliefs,

agree.

Two free-exercise cases are especially instructive.[34] In *Bowen v. Roy*, 476 U.S. 693 (1986), parents challenged the government's use of a Social Security number for their daughter because they believed that the use of the number would "rob her spirit." *Id.* at 695–97. The Court ruled for the government, reasoning that the parents were

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however, does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise, and to distinguish Plaintiffs' duties from obligations imposed, not on them, but on insurers and [third-party administrators]. Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact."). The Sixth Circuit used the same approach in a pre-*Hobby Lobby* case, but the Supreme Court has since vacated and remanded that decision for reconsideration in light of *Hobby Lobby*. *See Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014) ("[A]lthough we acknowledge that the appellants believe that the regulatory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require and whether they impose a substantial burden on appellants' exercise of religion."), *cert. granted and judgment vacated sub nom. Mich. Catholic Conference v. Burwell*, 135 S. Ct. 1914 (2015).

[34] Congress passed RFRA in response to *Employment Division v. Smith*, 494 U.S. 872 (1990), and one of the statute's purposes is "to restore the compelling interest test as set forth in [*Sherbert*, 374 U.S. 398,] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Accordingly, pre-*Smith* caselaw is relevant in interpreting RFRA. *See, e.g., McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 *passim* (5th Cir. 2014); *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013).

challenging the government's acts, not a bur- den on them, *id.* at 699–701, and that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens," *id.* at 699. The Court decided for itself whether the policy in question pressured the parents to modify their religious exercise, noting that, although

> Roy's religious views may not accept this distinction between individual and governmental conduct[,] [i]t is clear . . . that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference.

Id. at 701 n.6 (citation omitted).

The Court used the same approach in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). The plaintiffs complained of the government's plan to construct a road and permit logging on federal land, which they had used for religious purposes. *Id.* at 441–42. Relying on *Roy*, the Court rejected their claim. *Id.* at 447–49. It accepted the plaintiffs' statement of their religious beliefs, *id.* at 449–51, but concluded that the project involved only the government's management of its own property, which did not implicate the plaintiffs' constitutional rights, *id.* at 453. The Court stressed that, "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend

on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 451.

In addition, one RFRA case from the District of Columbia Circuit illustrates that the court decides the second question. In *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), an inmate objected to a requirement that he participate in the collection of a tissue sample, which the FBI would use to create a DNA profile, because he opposed on religious grounds the extraction and storage of DNA information. *Id.* at 673–74. The court ruled for the government. *Id.* at 686. It "[a]ccept[ed] as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened." *Id.* at 679. Applying that rule, it held that his religious exercise was not substantially burdened, because "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object)." *Id.*

The Court did not address the issue in *Hobby Lobby*. There, closely held for-profit corporations challenged the contraceptive mandate based on their owners' religious opposition to some contraceptives. *Id.* at 2764–66. The corporations were neither automatically exempt from the mandate as religious employers nor eligible for the accommodation; they had to offer insurance that covered contraceptives or face large penalties. *Id.* at 2775–76. The Court held that the mandate violated RFRA as applied to the

corporations. *Id.* at 2785. The substantial-burden analysis addressed only the first and third questions. The Court rejected the government's theory "that the connection between what the objecting parties must do (provide health-insurance coverage for [contraceptives]) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated," *id.* at 2777, explaining that drawing the line between acceptable and unacceptable levels of involvement was the owners' prerogative, *id.* at 2778–79. In doing so, the Court reaffirmed that courts defer to the objector's description of his religious exercise upon finding that his beliefs are sincerely held and religious. And the Court analyzed the substantiality of the penalties for noncompliance itself, rather than automatically accepting the corporations' position. *Id.* at 2775–77.

But the Court said nothing about the second question. It had no reason to, because there was no doubt that imposing large penalties for not offering insurance that covered contraceptives pressured the corporations to facilitate the use of contraceptives.

In the absence of further guidance from the Supreme Court, we are bound to follow *Roy* and *Northwest Indian Cemetery* by deciding, as a question of law, whether the challenged law pressures the objector to modify his religious exercise. The other circuits' decisions confirm the continued vitality of that approach.[35]

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[35] *See Notre Dame*, 2015 WL 2374764, at *6; *Geneva*, 778 F.3d at 435; *Priests for Life*, 772 F.3d at 247; *Kaemmerling*, 553 F.3d at 679.

B.

Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties. Because RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise.[36]

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[36] *See Notre Dame*, 2015 WL 2374764, at *6 ("As far as we can determine from the very limited record, the only 'conduit' [for payments for contraceptives] is between the [insurer and the third-party administrator] and Notre Dame students and staff; the university has stepped aside."); *Geneva*, 778 F.3d at 438 ("By participating in the accommodation, the eligible organization has no role whatsoever in the provision of the objected-to contraceptive services."); *Priests for Life*, 772 F.3d at 256 ("It is as a result of the ACA, and not because of any actions Plaintiffs must take, that Plaintiffs' employees are entitled to contraceptive coverage provided by third parties and that their insurers or TPA must provide it; RFRA does not entitle Plaintiffs to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled. A religious adherent's distaste for what the law requires of a third party is not, in itself, a substantial burden; that is true even if the third party's conduct towards others offends the religious adherent's sincere religious sensibilities."). The Sixth Circuit reached the same result in its now-vacated decision. *See Mich. Catholic*, 755 F.3d at 390 ("The appellants allege that providing, paying for, and/or facilitating access to contraceptive coverage burdens their exercise of religion. [T]he exemption and accommodation framework does not require them to do any of these things. The framework does not permit them to prevent their insurance

First, the plaintiffs claim that their completion of Form 700 or submission of a notice to HHS will authorize or trigger payments for contraceptives. Not so. The ACA already requires contraceptive coverage: "A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for . . . with respect to women, such additional preventive care . . . as provided for in comprehensive guidelines" promulgated by HHS, 42 U.S.C. § 300gg-13(a)(4), which includes contraceptives.[37] That provision expressly requires insurers to offer coverage. And although it does not specifically mention third-party administrators, they administer "group health plan[s]," which must include coverage. Nothing suggests the insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation. Accordingly, the plaintiffs' completion of Form 700 or submission of a notice to HHS does not authorize or trigger payments for contraceptives, because the plaintiffs cannot authorize or trigger what others are already required by law to do.[38]

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issuer or third-party administrator from providing contraceptive coverage to their employees pursuant to independent obligations under federal law. However, the inability to 'restrain the behavior of a third party that conflicts with the [appellants'] religious beliefs,' does not impose a burden on the appellants' exercise of religion." (alteration in original) (citation omitted) (quoting *Mich. Catholic Conference v. Sebelius*, 989 F. Supp. 2d 577, 587 (W.D. Mich. 2013))).

[37] Group Health Plans and Health Insurance Insurers, 77 Fed. Reg. at 8725–26.

[38] *See Notre Dame*, 2015 WL 2374764, at *7–9 (concluding that

The plaintiffs offer two variations of that theory, but those are equally unconvincing. The plaintiffs assert that their listing the names and contact information of their insurers and third-party administrators will make it easier for the government to inform those entities of their obligations. It will, but that does not mean the plaintiffs' religious exercise is burdened. Without the accommodation, the plaintiffs would have to offer a plan that covered contraceptives,[39] so the effect of the government's communications with the insurers and third-party administrators is to shift the burden to those entities. Pro- viding the names and contact information facilitates only the plaintiffs' exemption, not contraceptive coverage.

Separately, the self-insured plaintiffs contend that their completion of Form 700 or submission of a notice to HHS will make their third-party administrators eligible for the government's reimbursement. Again, it will,[40] but that does not mean the plaintiffs' religious exercise is burdened.

For the insured plans, the insurers will not lose money by paying for contraceptives, because the

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federal law, not the completion of Form 700 or submission of a notice to HHS, triggers payments for contraceptives); *Geneva*, 778 F.3d at 435–42 (same); *Priests for Life*, 772 F.3d at 252–56 (same).

[39] *See* 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2); 42 U.S.C. § 300gg-13(a)(4); Group

Health Plans and Health Insurance Insurers, 77 Fed. Reg. at 8725–26.

[40] *See* 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d).

savings on pregnancy care at least are expected to equal the costs of contraceptives.[41] There is a potential problem for the self- insured plans, though: The third-party administrators do not bear the risk of claims, so they will not realize any savings on pregnancy care. The regulations prohibit passing on the costs of contraceptives, 29 C.F.R. § 2590.715-2713A(b)(2), but in an efficient market, the third-party administrators would be unable to avoid doing so without additional revenue. The reimbursement is the government's attempt to solve the problem by giving the third-party administrators additional money to cover the costs of contraceptives. Assuming the amount is sufficient, the reimbursement is what will allow the self- insured plaintiffs to avoid paying for contraceptives.

Second, the plaintiffs urge that the accommodation uses their plans as vehicles for payments for contraceptives. But that is just what the regulations prohibit. Once the plaintiffs apply for the accommodation, the insurers may not include contraceptive coverage in the plans.[42] The insurers and third-party administrators may not impose any direct or indirect costs for contraceptives on the plaintiffs[43]; they may not send materials about contraceptives together with plan materials[44]; in fact,

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[41] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39877 (July 2, 2013).

[42] 29 C.F.R. § 2590.715-2713A(c)(2)(i)(A); 45 C.F.R. § 147.131(c)(2)(i)(A).

[43] 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii).

[44] 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d);

they must send plan participants a notice explaining that the plaintiffs do not administer or fund contraceptives.[45] The payments for contraceptives are completely independent of the plans.[46]

Third, the plaintiffs theorize that the requirement that they offer their employees a group health plan pressures them to authorize or facilitate the use of contraceptives. They must contract with the insurers and third-party administrators to offer a plan, and those entities pay for contraceptives. In the plaintiffs' view, the insurers and third-party administrators would not do so absent the contracts, so the contracts facilitate the use of contraceptives.

The plaintiffs misunderstand the role of the contracts. Under the accommodation, the contracts are solely for services to which the plaintiffs do not object; the contracts do not provide for the insurers and third-party administrators to cover contraceptives, do not make it easier for those entities to pay for contraceptives, and do not imply endorsement of contraceptives. *See supra* notes 42–46 and accompanying text. Instead, the plaintiffs are excluding contraceptive coverage from their plans and expressing their disapproval of it, but the government is requiring the insurers and third-party

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45 C.F.R. § 147.131(d).

[45] 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

[46] *See Notre Dame*, 2015 WL 2374764, at *5–7 (explaining that the accommodation does not use the plans as vehicles for payments for contraceptives); *Geneva*, 778 F.3d at 438, 441 (same); *Priests for Life*, 772 F.3d at 253–54 (same).

administrators to offer it—separately from the plans—despite the plaintiffs' opposition. The plaintiffs' religious beliefs forbid them from providing or facilitating access to contraceptives, but the requirement that they enter into the contracts does not force them to do so. The acts that violate their faith are the acts of the government, insurers, and third-party administrators, but RFRA does not entitle them to block third parties from engaging in conduct with which they disagree.[47]

A hypothetical illustrates the breadth of the plaintiffs' position. Suppose a person needs a passport for an upcoming trip. She fills out the application, but as she is about to mail it, she learns that the State Department will assign her a number when it approves her request. She opposes, on religious grounds, the use of a number to identify her, *see generally Roy*, 476 U.S. at 695–97, as well as any act that would facilitate the use of a number, so she sues under RFRA.

That case is indistinguishable from the one at bar. The objector does not oppose completing the application but only the State Department's

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[47] *See Nw. Indian Cemetery*, 485 U.S. at 453 (holding that an adherent was not entitled to challenge a third party's actions that offended his beliefs); *Roy*, 476 U.S. at 701 (same); *Notre Dame*, 2015 WL 2374764, at *5–7 (concluding that the requirement to offer a plan does not impose a substantial burden, because the contracts with the insurers and third-party administrators do not facilitate the use of contraceptives); *Geneva*, 778 F.3d at 438 n.13 (same); *Priests for Life*, 772 F.3d at 253 (same); *Kaemmerling*, 553 F.3d at 679 (holding that an adherent was not entitled to challenge a third party's actions that offended his beliefs).

assigning her a number in response even though she need not help the department do so. The idea that she could force the department to justify, under strict scrutiny, its application requirement or use of a number is unreasonable. Yet the plain- tiffs here are making the same type of claim. Accepting such claims could subject a wide range of federal programs to strict scrutiny. Perhaps an applicant for Social Security disability benefits disapproves of working on Sundays and is unwilling to assist others in doing so. He could challenge a requirement that he use a form to apply because the Social Security Administration might process it on a Sunday.[48] Or maybe a pacifist refuses to complete a form to indicate his beliefs because that information would enable the Selective Service to locate eligible draftees more quickly.[49] The possibilities are endless, but we doubt Congress, in enacting RFRA, intended for them to be.

The Court did not resolve the issue in *Hobby Lobby* but, instead, rejected the government's notion that there was no substantial burden, because the intervening acts of third parties, such as employees' decisions to use contraceptives, made the connection between the plaintiffs' providing contraceptive coverage and the destruction of an embryo too attenuated. 134 S. Ct. at 2777–79. The distinction between that case and the instant one is that the regulations compelled the *Hobby Lobby* plaintiffs to

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[48] *See generally Geneva*, 778 F.3d at 439 n.14 (considering an analogous hypothetical).

[49] *See generally Notre Dame*, 2015 WL 2374764, at *18 (discussing a similar hypothetical).

participate in providing contraceptives, albeit in an indirect way. What the regulations require of the plain- tiffs here has nothing to do with providing contraceptives.

The difference is not just that there are more links in the causal chain here than in *Hobby Lobby*—a difference that would not change the outcome, given that we accept an adherent's judgment as to how much separation is enough.[50] It is also that the type of compelled act is quite different—the act at issue in this case is not one that authorizes or facilitates the use of contraceptives.

The *Hobby Lobby* Court did not consider this type of situation and actually suggested in *dictum* that the accommodation does not burden religious exercise: The majority noted that "HHS has effectively exempted certain religious nonprofit organizations" through the accommodation, *id.* at 2763, and the concurrence observed that "the accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs," *id.* at 2786 (Kennedy, J., concurring).[51] Thus, *Hobby Lobby* is of no help to the plaintiffs' position, and the requirement to offer a group health plan does not burden their religious exercise.

Fourth, the self-insured plaintiffs postulate that

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[50] *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779; *Thomas*, 450 U.S. at 715.

[51] The Court cautioned that it did "not decide whether [the accommodation] com- plies with RFRA for purposes of all religious claims." *Hobby Lobby*, 134 S. Ct. at 2782.

they will be required to pay for contraceptives despite the regulations to the contrary. They say the government lacks the authority under ERISA to prohibit third-party administrators from passing on the costs, insurers are unlikely to work with the third- party administrators because of the small amounts involved (an insurer must seek reimbursement on behalf of a third-party administrator[52]), and the 115% reimbursement will not cover the costs.

This issue is not ripe, and we express no view on its merits. "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical."[53] "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'"[54] "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required."[55] "However, 'even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness.'"[56]

The plaintiffs' prediction that third-party

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[52] 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d).

[53] *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)).

[54] *Id.* (quoting *New Orleans*, 833 F.2d at 586).

[55] *Id.* (quoting *New Orleans*, 833 F.2d at 587).

[56] *Id.* (quoting *Cent. & S. W. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 690 (5th Cir. 2000)).

administrators will attempt to charge them for contraceptives may not come to pass, so the matter is not fit for judicial decision. The administrative costs associated with payments for contraceptives may turn out to be low. If so, the insurers and third-party administrators will be eager to take advantage of the 115% reimbursement,[57] and the third-party administrators will profit from the arrangement and have no occasion to pass on the costs. The plaintiffs say that is unlikely because only a small number of their employees will use contraceptives. But their reasoning overlooks the economies of scale that the insurers and third-party administrators could establish by paying for contraceptives for the employees of many religious organizations.

On this record, there is no basis for assessing which outcome is most likely. And withholding court consideration would not harm the plaintiffs. There is no allegation that any third-party administrator has asked the plain- tiffs to pay for contraceptives. If that happened, the plaintiffs could challenge the regulations then and would have had to pay nothing in the meantime. As a result, we decline to reach the issue.

Fifth, the two dioceses, which are automatically exempt from the mandate as religious employers, submit that the regulations will require them either to sponsor a plan that complies with the contraceptive mandate or to remove from their plans

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[57] *See Notre Dame*, 2015 WL 2374764, at *7 (speculating as to why insurers and third-party administrators might want to participate in the scheme).

affiliated entities that are not religious employers but are eligible for the accommodation. That is a misreading of the regulations, which allow those types of organizations to share a plan provided that the entity that does not qualify as a religious employer applies for the accommodation.[58] Because the accommodation does not burden the plaintiffs' religious exercise, neither does a requirement that the dioceses do nothing and the affiliated entities apply for the accommodation.[59]

In short, the acts *the plaintiffs* are required to perform do not involve providing or facilitating access to contraceptives, and the plaintiffs have no right under RFRA to challenge the independent conduct of third parties. Because the plaintiffs have not shown that the regulations substantially burden their religious exercise or, in *University of Dallas*, have not demonstrated a substantial likelihood of doing so, we need not reach the strict-scrutiny prong or the other requirements for an injunction.

REVERSED.

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[58] *See* Coverage of Certain Preventive Services, 78 Fed. Reg. at 39886.

[59] *See Geneva*, 778 F.3d at 443–44 (explaining that the different treatment of dioceses and affiliated organizations does not impose a substantial burden).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY and
HOUSTON BAPTIST UNIVERSITY,
PLAINTIFFS,

and

WESTMINSTER THEOLOGICAL SEMINARY,
PLAINTIFF-INTERVENOR,

v.

KATHLEEN SEBELIUS, et al.
DEFENDANTS

Civil No. 12-3009

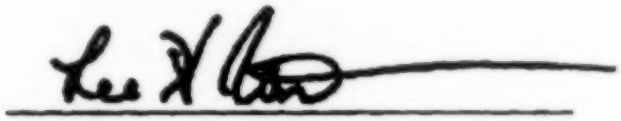
ORDER

LEE H. ROSENTHAL, *District Judge*:

Having considered Plaintiffs' unopposed motion for Rule 54(b) certification and for a stay, the Court GRANTS Plaintiffs' motion. The Court FINDS, based

on the parties' submissions and the unique circumstances of the nationwide parallel litigation concerning the issues in this lawsuit, and pursuant to Rule 54(b), that there is no just reason for delay of final judgment on Plaintiffs' Religious Freedom Restoration Act claims. The Court therefore CERTIFIES that its order of injunction dated December 27, 2013, Dkt. 134, constitutes a permanent injunction and partial final judgment.

The Court further ORDERS that litigation of Plaintiffs' remaining claims in this Court, including all of their constitutional and Administrative Procedure Act claims, be STAYED until further order of this Court.



LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

January 21, 2014

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY, *et al.*,
PLAINTIFFS,

v.

KATHLEEN SEBELIUS, *et al.*,
DEFENDANTS

Civil Action No. H-12-3009

MEMORANDUM AND OPINION

LEE H. ROSENTHAL, *District Judge*:

The Affordable Care Act mandates coverage for contraceptive services in group health plans that employers must provide their employees. Churches, nonprofit religious organizations, and for- profit corporations owned by deeply religious individuals challenged this mandate as offensive to their religious beliefs. The federal government responded.

Recent regulations exempt "religious employers," primarily churches, from the mandate; provide an accommodation for nonprofit religious organizations allowing them to avoid direct involvement in providing coverage or paying for contraceptive products or devices they find offensive to their faith; and maintains the mandate for for-profit employers, regardless of their owners' sensibilities.

One set of cases, filed by for-profit employers, is before the Supreme Court.[1] A second set of cases, filed by nonprofit religious organizations, includes this case. Both sets of cases present difficult arguments that reflect the pluralistic society we both celebrate and struggle to preserve and protect.

In this second set of cases, the nonprofit religious organizations contend that the accommodation violates vital protections provided under the Religious Freedom Restoration Act and the Constitution, by requiring them to facilitate their employees' free access to emergency contraception or face crippling penalties. The government and an amicus respond that the accommodation sufficiently insulates the organizations from any religiously offensive conduct without stripping thousands of women from free access to emergency-contraceptive services that may be critical to avoiding unwanted pregnancies. The government and the amicus

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[1] *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, *cert. granted*, 134 S. Ct. 678 (2013); *see also Gilardi v. U.S. Dep't of Health & Human Servs*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013).

forcefully argue that an injunction extending the exemption to the plaintiffs would permit them to impose their religious beliefs on their employees who may not share those beliefs by making access to free emergency contraceptives more difficult.

Several district courts have already issued opinions, with inconsistent results.[2] Because the issues are legal and the facts are essentially

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[2] For examples of district courts finding for non-profit plaintiffs on one or more claims, *see e.g., Southern Nazarene University v. Sebelius*, No. 13-cv-1015-F (W.D. Okla. Dec. 23, 2013); *Geneva College v. Sebelius*, No. 12-cv-00207(JCF) (W.D. Pa. Dec. 23 2013); *Legatus v. Sebelius*, No. 12-cv-12061-RHC-MJH (E.D. Mich. Dec. 20, 2013; *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-cv-1441 (ABJ) (D.D.C. Dec. 20, 2013) (enjoining mandate on "compelled silence" argument; but otherwise denying injunctive relief), emergency motion for expedited briefing for injunction filed Dec. 23 2013, No. 13-5371 (D.C. Cir.); *Reaching Souls Int'l v. Sebelius*, No. 13-cv-01092-D (W.D. Okla. Dec. 20, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv- 1092-D (W.D. Ok. Dec. 20, 2013)(DeGiusti, J.); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542 (BMC), 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (holding that the accommodation violates RFRA and enjoining the mandate); *Persico v. Sebelius*, No. 13-cv-00303 (AJS) (W.D. Pa. Nov. 21, 2013); *Zubik v. Sebelius*, No. 13-cv-01459 (AJS) (W.D. Pa. Nov. 21, 2013).

For cases finding for the government on RFRA claims, *see, e.g., Catholic Diocese of Nashville v. Sebelius*, No. 3:13-cv-1303 (M.D. Tenn. Dec. 26, 2013); *University of Notre Dame v. Sebelius*, No. 13-cv-01276 (N.D. Ind. Dec. 20. 2013), emergency motion for injunction filed Dec. 23, 2013, No 13-3853 (7th Cir.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-cv- 1261 (EGS), 2013 WL 6672400 (D.D.C. Dec. 19, 2013) (holding that the accommodation does not create a RFRA substantial burden), emergency motion for injunction filed Dec. 20, 2013, No. 13-5368 (D.C. Cir.).

undisputed, this and other district court opinions are at most data points, chiefly important as necessary steps to the appellate courts.

Based on the pleadings, the motion for the preliminary injunction and response, the parties' submissions, the lengthy oral argument, and the governing law, this court finds that the plaintiffs and the intervenor have demonstrated a substantial likelihood of success on the merits of their claim under the Religious Freedom Restoration Act. This court preliminarily enjoins the enforcement of the mandate to cover emergency contraception against the plaintiffs and intervenor. The reasons are explained below.

I. Background

The plaintiffs, two universities affiliated with the Baptist Church, and the intervenor, a seminary affiliated with the Presbyterian Church, (together, the "plaintiffs"), believe as a matter of faith that life begins when an egg becomes fertilized. They also sincerely believe that the emergency contraceptives their group health-plan issuer or third-party administrator will have to pay for under the ACA's mandate cause abortions. In the plaintiffs' view, emergency-contraceptive products are "abortifacients." The plaintiffs contend that the ACA's accommodation is infirm under the Constitution and RFRA because the accommodation requires them to take an action that triggers and facilitates their employees' free access to abortion-causing drugs, making the plaintiffs complicit in the taking of innocent life and causing them to violate their belief that they must protect the innocent human life that is a fertilized egg. Because both

failing to comply with the accommodation's requirements and refusing to provide emergency-contraceptive group health-plan coverage would expose the plaintiffs to onerous financial penalties, they argue that the ACA's mandate and accommodation violate the Religious Freedom Restoration Act, the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause.

The plaintiffs seek a preliminary injunction barring enforcement of the mandate and partial summary judgment on their claims under the Religious Freedom Restoration Act, the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause. The government has cross-moved for summary judgment.

A. The Plaintiffs

The varieties of religious beliefs affect how the issue is presented. In some cases, the challenging organization is affiliated with a religion, such as the Catholic Church, that opposes all contraception, including pills designed to prevent an egg from becoming fertilized. The plaintiffs in this case are affiliated with Protestant churches that believe that life begins at conception. The plaintiffs are not opposed to all contraception methods, but they are opposed to some, including those that prevent a fertilized egg from implanting in the uterus. Details about each of the parties are set out below.

1. East Texas Baptist University

In October 1912, the State of Texas chartered the College of Marshall, a two-year college in Marshall, Texas. (Docket Entry No. 70–1, Ex. A–1.) The College of Marshall registered its first class in 1917. (*Id.*) In

1924, the Baptist General Convention of Texas assumed the college's debt. (*Id.*) In 1944, the College of Marshall changed its name to East Texas Baptist College and "elevated" to a four-year institution. (*Id.*) The Southern Association of Colleges and Schools accredited East Texas Baptist College in 1957. (*Id.*) In 1984, the school became East Texas Baptist University ("ETBU"). In 2013, ETBU serves "over 1,250 students in 30 undergraduate degree programs and 4 graduate degree programs." (Docket Entry No. 70–1, Oliver Decl., at ¶ 7.)

ETBU is a nonprofit corporation affiliated with the Baptist General Convention of Texas. (Docket Entry No. 70–1, Ex. A–1.) A 36–member Board of Trustees governs ETBU. (*Id.*) The Baptist General Convention of Texas elects 19 board members; the ETBU Board elects the remaining 17. (*Id.*) ETBU holds its property in trust for, and conducts its affairs based on, the policies that the 36–member Board establishes. (*Id.*)

ETBU is a coeducational institution chartered as a "religious, arts and sciences and pre-professional studies institution of higher education." (*Id.*) ETBU commits itself to "Christian stewardship" and focuses on the "development of intellectual inquiry, social consciousness, wellness, skills for a contemporary society, global awareness, and Christian character, [because] these endeavors prepare students to serve humanity and the Kingdom of God." (*Id.*) ETBU believes that the "Christian faith provides the surest foundation for life," and "employ[s a] Christian faculty who are dedicated to teaching, scholarship, advising, and service as they model the principles of the Christian faith. As a Baptist university, [ETBU

is] committed to the integration of learning and Christian faith in the pursuit of truth." (*Id.*)

ETBU "seeks administrators, academic officers, faculty, and staff who have a personal relationship with Christ, who are familiar with truth as revealed in the Bible, who live out this truth in the presence of others, who can create an environment where Christ is lived out in the life of the individual, and who have the necessary knowledge, experience, and competence for the position." (*Id.*) In "their initial and continuing employment, administrators, faculty, and staff at [ETBU] are to profess a saving relationship with Jesus Christ and to exhibit a lifestyle that demonstrates that commitment." (*Id.*) ETBU "has about 227 full-time employees and 56 part-time employees" who profess these commitments. (Docket Entry 70–1, Oliver Decl., at ¶ 28).

Included in these commitments is a belief that "Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death." (*Id.* ¶ 16 (citing Genesis and Psalms)). Consistent with this belief, ETBU "condemns the taking of innocent human life ... and commands Christians to protect the weak and vulnerable." (*Id.* ¶ 18 (citing Exodus and Psalms)). ETBU follows the 2000 Baptist Faith and Message Study, including the commandment to "speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." (*Id.* (quoting Ex. A–4)). ETBU "believes and teaches that abortion ends human life and is a sin." ETBU contends that [it] is a violation of [its] teachings and religious beliefs to deliberately provide insurance

coverage for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, abortion procedures, and related services." (*Id.* at ¶ 20). ETBU objects to the use of emergency contraception drugs, like Plan B and Ella, and to devices like copper IUDs, believing that those drugs and devices cause death to a fertilized embryo. (*Id.* at ¶¶ 23–26).

Consistent with those beliefs, the ETBU is self insured and uses a third-party administrator, Mutual Assurance Administrators, Inc. to provide its employees with a Healthcare Benefits Plan. Currently, the plan expressly excludes the emergency-contraceptive drugs and devices. (*Id.* ¶ 27; Docket Entry No. 70–1, Ex. A–7 at 50).

2. Houston Baptist University

Houston Baptist University ("HBU") is a Christian liberal-arts college in Houston, Texas. (Docket Entry No. 70–2, Sloan Decl., at ¶ 4). HBU is affiliated with the Baptist General Convention of Texas and with the national Southern Baptist Convention. (*Id.* at ¶ 5). The student handbook states that HBU's mission is "to provide a learning experience that instills in students a passion for academic, spiritual, and professional excellence as a result of [their] central confession, Jesus is Lord." (*Id.* at ¶ 6 (internal quotations omitted)). HBU's bylaws require that "all those who become associated with [HBU] as a trustee, officer, member of the faculty or of the staff, and who perform work connected with the educational activities of the University, must believe in the divine inspiration of the Bible, both the Old Testament and New Testament, [and] that man was directly created by God. (*Id.* ¶ 8). One of HBU's

institutional goals is to "express Christ's Lordship as a function of its academic mission." (*Id.* at ¶ 10 (quotation marks omitted)).

Similar to ETBU, HBU believes that "Scripture calls Christians to uphold the God-given worth of human beings, as the unique image bearers of God, from conception to death." (*Id.* ¶ 11 (citing Genesis and Psalms)). HBU, like ETBU, follows the 2000 Baptist Faith and Message, which instructs adherents that they "should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." (*Id.* ¶ 13). HBU considers this commitment when it hires faculty, "all of whom are expected to affirm and teach that human life exists from conception to natural death, that the dignity of life is a gift from God, and that as a result abortion, except where it is necessary to save the physical life of the mother, is a sin." (*Id.* ¶ 14). HBU has "about 355 full-time and 118 part-time employees." (*Id.* ¶ 24).

HBU also considers this commitment in admitting students. HBU admits students from all religions but expects that each student will abide by a Student Code of Conduct. This Code affirms that HBU "embraces a biblical position which honors the sanctity of life and cannot support actions which encourage or result in the termination of human life through suicide, euthanasia, or abortion-on-demand." (*Id.* ¶ 15 (quotation marks omitted)).

HBU "has a sincere religious objection to providing coverage for emergency contraceptive drugs Plan B and Ella, since it believes [that] those drugs could prevent a human embryo—which it understands to include a fertilized egg before it

implants in the uterus—from implanting in the wall of the uterus, causing the death of the embryo." (*Id.* ¶ 17). "The same objection applies to [certain] IUDs." (*Id.*) HBU believes that "artificial means of [preventing] the implantation of a human embryo [are] abortion[s]." (*Id.* ¶ 18). "It is similarly a violation of [HBU's] religious beliefs to deliberately take any action (including providing access to health insurance) that would facilitate access to abortion causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a third party administrator and not by [HBU]." (*Id.* ¶ 20). Consistent with these views, [HBU's] employee health benefit plan does not cover abortions or emergency contraception such as Plan B, Ella, or other drugs and devices which it considers to be "abortion causing." (*Id.* at ¶ 22).

HBU is insured through a church health plan, Guidestone. Guidestone has contracted with Highmark Blue Cross Blue Shield to be the third-party administrator (TPA) of the HBU plan.

3. Westminster Theological Seminary

Founded in 1929, Westminster is a graduate-level theological seminary dedicated to the "[r]eformed understanding of the Christian faith" often associated with Presbyterianism. (Docket Entry No. 75–2 at ¶ 3). Westminster "exists to serve Christ and his kingdom by extending the knowledge of the glory of God in Christ until that knowledge covers the earth as the waters cover the seas." (*Id.* ¶ 5). Westminster requires its faculty to "subscribe *ex animo* to the Westminster Standards" and professes to hire "only personnel who belong to a Christian church and subscribe to a biblical orthodoxy (belief)

and orthopraxy (practice)." (*Id.* ¶¶ 10–11). These beliefs and practices include protecting and defending the innocent, including unborn children. (*Id.* ¶ 14). Westminster has 60 full-time employees and 65 part-time employees who profess these commitments. (*Id.* ¶ 24).

Westminster believes that abortions sinfully end human life. (*Id.* ¶ 16). Westminster believes that emergency contraception such as Plan B, Ella, and certain IUDs are "abortion causing." (*Id.* ¶¶ 17–19). "Westminster has a sincere religious objection to providing [insurance] coverage for the emergency contraceptive drugs Plan B and Ella and their variants, since it believes those drugs could prevent a human embryo—which it understands to include a fertilized egg before it implants in the uterus—from implanting ..., causing the embryo to die." (*Id.* ¶ 18). Westminster has the same objection to certain IUDs. As a result, "it is a violation of Westminster's teachings and religious beliefs for it to deliberately fund, sponsor, underwrite, or otherwise facilitate access to Plan B and Ella, or abortion—causing IUDs." (*Id.* ¶ 20). "It is similarly a violation of Westminster's religious beliefs to deliberately take any action (including providing access to health insurance) that would facilitate access to abortion—causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a third party administrator and not by Westminster." (*Id.* ¶ 21).

Westminster is insured through Independent Blue Cross of Philadelphia. Curiously, though Westminster "would never condone insurance coverage for abortion-causing drugs, procedures or

related services ... its health insurer [had] inserted such coverage into Westminster's plan" without its knowledge. Westminster's insurer would not remove the coverage from its plan, and Westminster was trying "to find an insurer that will honor its requirements by providing health insurance without the offensive coverages, but has so far not found a viable alternative." (*Id.* ¶ 22). As the litigation proceeded, Westminster separated its medical care coverage from its pharmaceutical coverage so as to remove coverage for what it considers to be abortifacient drugs from its employees' health insurance plans. (Docket Entry No. 140). Apparently, however, Westminster's plan still covers the IUDs that it finds objectionable.

B. The ACA's Contraceptive Mandate and Accommodation

The ACA, enacted in 2010, with the Health Care and Education Reconciliation Act, established requirements for employer "group health plans," defined to include plans that are insured by issuers and plans self-insured by employers. The ACA requires coverage for many preventative medical services with no charge for the patient. The relevant requirement states that a "group health plan and a health insurance insurer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements" for "preventative care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg–13(a)(4).

On July 19, 2010, HHS published a First Interim Final Rule stating that it was "developing these

guidelines." 75 Fed.Reg. 41726, 41728 (July 2010). On July 19, 2011, the Institute of Medicine ("IOM"), a congressionally funded entity established to recommend guidelines for the preventative services necessary for women, issued a report. The IOM was given this task because there were no HRSA guidelines on preventative care for women when HHS issued the Interim Final Rules. The IOM report recommended including the "full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." The HRSA adopted this recommendation on August 1, 2011, as *Women's Preventative Services: Required Health Plan Coverage Guidelines* (the "Guidelines"). (Docket Entry No. 70–3, Ex. C–1). The Guidelines required all non-grandfathered plans to "provide coverage without cost sharing in the first plan year ... that begins on or after August 1, 2012" for all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." (*Id.*).

The FDA approves certain drugs that "prevent pregnancy after birth control failure or unprotected sex," including Levonorgestrel (Plan B) and ulipristal acetate (Ella). (*Id.*). The FDA also approves copper intrauterine devices that "may prevent [a fertilized] egg from attaching (implanting) in the womb (uterus)." (*Id.*) These drugs and devices are commonly known as emergency contraceptives.

Shortly after the HRSA published these Guidelines, the HHS amended the Interim Final Rule. 76 Fed.Reg. 46621–01 (Aug. 3, 2011). The

amended rule gave the "HRSA additional discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned [and to] establish the exemption." *Id.* at 46623. As amended, the regulation defined a "religious employer" as an organization that meets "all of the following" criteria:

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and 6033(a)(3)(a)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed.Reg. at 46626. The fourth criteria "refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order." 76 Fed.Reg. at 46623.

The mandate and religious-employer exemption caused "over 200,000 responses to the request for comments on the amended interim final regulations." 77 Fed.Reg. 8725, 8726–27 (Feb. 15, 2012). "[A] number of comments asserted that the religious employer exemption [wa]s too narrow." 77 Fed.Reg. at 8727. These comments came from religiously affiliated educational institutions, health-care organizations, and charities. *Id.* Some

"expressed concern that the exemption for religious employers will not allow them to continue their current exclusion of contraceptive services." Others "expressed concerns about paying for such services and stated that doing so would be contrary to their religious beliefs." *Id.*

In response, the HHS announced a "Temporary Enforcement Safe Harbor" period. 77 Fed.Reg. 8726. This postponed enforcement of the mandate against nonprofit organizations with religious objections, to allow the development of proposed changes accommodating the objections of nonexempt religious nonprofits. (Docket Entry No. 71–3, Ex. C–4, Department of Health and Human Services, *Guidance on the Temporary Enforcement Safe Harbor for Certain Employees* (updated June 28, 2013)). On March 21, 2012, the HHS published an Advanced Notice of Proposed Rulemaking announcing the intent to supplement the religious-employer exception with an accommodation for certain nonexempt religious organizations. 77 Fed.Reg. 16501, 16503 (March 21, 2012) ("[T]he Departments announced plans to expeditiously develop and propose changes to the final regulations ... [including] accommodating non-exempt, non-profit religious organizations' religious objections to covering contraceptive services....").

On February 6, 2013, the HHS published a Notice of Proposed Rulemaking with two "key changes" to the preventative services coverage rules:

First, the proposed rules would amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes

extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths. Second, the proposed rules would establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage. 78 Fed.Reg. 8456, 8460–61 (Feb. 2013).

The HHS proposed "eliminating the first three prongs of the [religious-employer] definition and clarifying the application of the fourth." *Id.* When the HHS "first defined religious employer, the primary goal was to exempt the group health plans of houses of worship.... By restricting the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders, the fourth prong of the current definition of religious employer would alone suffice to meet the goal." *Id.* The HHS also proposed an accommodation for "eligible organizations with religious objections to contraceptive coverage." *Id.* at 8462. The proposed accommodation would provide "plan participants and beneficiaries contraceptive coverage without cost sharing while insulating their employers or institutions of higher education from contracting, arranging, paying or referring for such coverage." *Id.* Over 400,000 comments were submitted.

The HHS issued the final mandate with the revised exemption and accommodation in June 2013. *See* 78 Fed. Reg. 39870 (July 2, 2013). The revision adopted the simplified definition of religious employer exempt from the mandate. The

accompanying explanation stated that "the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement," and noted that religious employers meeting this definition were "more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. at 39874. The final regulation defined an exempt religious employer an "organization that is organized and operates as a nonprofit entity and is referred to in [Internal Revenue Code] section 6033(a)(3)(A)(I) or (iii)." 45 C.F.R. § 147.131(a). "[C]hurches, their integrated auxiliaries, and conventions or associations of churches" qualify for the exemption, as well as the "exclusively religious activities of any religious order." 26 U.S.C.A. § 6033(a)(3)(A)(i, iii).

The final regulation included an accommodation for eligible organizations such as the plaintiffs. These organizations are not "religious employers" exempt from the requirement to include contraceptive coverage with no cost-sharing in their employee group health plans. "After meeting a self-certification standard, ..., nonprofit religious organizations that qualify for these accommodations are not required to contract, arrange, pay, or refer for contraceptive coverage; however, plan participants and beneficiaries ... will still benefit from separate payments for contraceptive services without cost sharing or other charge...." *Id.* The final regulation

defined an "eligible organization" that is not exempt but is subject to the accommodation as an organization that satisfies all of the following criteria:

> (1) The organization opposes providing coverage for some or all of the contraceptive services required to be covered ... on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> The organization holds itself out as a religious organization.

45 C.F.R. § 147.131(b)(1–3).

If such an organization complies with the self-certification requirement, and meets additional requirements, it complies with the mandate and avoids the statutory penalties if it:

> (4) ... self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

45 C.F.R. § 147.131(b)(4).

Under the rule, an eligible organization must

prepare the self-certification and furnish a copy to its issuer or, if the organization self-insures, to its TPA on request once in the plan-coverage period. Those acts accomplished, the organization is deemed to have complied with the preventive-services mandate. The rule states:

> (c)(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any [preventative services requirement] to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self certification from the eligible organization regarding its status as such.

45 C.F.R. § 147.131(c)(1). "The final regulations do not require the self-certification to be submitted to any of the Departments." 78 Fed. Reg. 39878.

When the eligible organization is self-insured, the self-certification is provided to the TPA. If an issuer provides the coverage and payments, the self-certification goes to that issuer. The self-certification does more than state that the organization qualifies for the accommodation because it objects on religious grounds to contraceptive coverage. The form notifies the TPA or issuer of their obligations set out in the federal regulations.

Once a group health plan issuer is notified of and receives a copy of the organization's self-certification, the issuer must:

> (A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and
>
> (B) Provide separate payments for any contraceptive services required to be covered under the [preventative services requirement] for plan participants and beneficiaries for so long as they remain enrolled in the plan.

45 C.F.R. § 147.131(c)(2)(i)(A, B). The issuer is required to pay for contraceptive services requested by plan participants and beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to make payments for contraceptive services. When it makes payments for contraceptive services used by plan participants and beneficiaries, the issuer must do so without imposing any premium, fee, or other charge, for any part, directly or indirectly, on the eligible organization, its group health plan, or its plan participants or beneficiaries. In making such payments, the issuer must ensure that it does not use any premiums collected from eligible organizations. A statement accompanying the accommodation explained that "cost neutrality" would remove the need for a source of money to pay for the emergency contraceptive products or services: "issuers have various options for achieving cost neutrality, notwithstanding that they must make payments for contraceptive services without cost sharing, premium, fee, or other charge to the eligible

organization, the group health plan, or plan participants." Fed.Reg. at 39877.

If the eligible organization's group plan is self-insured, the TPA must provide or arrange for payments for contraceptive services requested by plan participants or beneficiaries. *See* 26 C.F.R. 54.9815–2713A; 29 C.F.R. §§ 2510.3–16,2590.715–2713A. This requirement is imposed through the Department of Labor's ERISA enforcement authority. 78 Fed.Reg. at 39,874. The self-certification is "treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." *Id.* at 39,879. The TPA must provide these services "without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan." *Id.* at 39,879–80. The TPA may seek reimbursement for such payments through adjustments to its federally-facilitated Exchange ("FFE") user fees. *Id.* at 39,882.

The self-certification form provided to the TPA or issuer sets out the regulations requiring notice to plan participants and beneficiaries that they may get contraceptive coverage without cost. The regulations recognize that application materials are distributed to plan participants and beneficiaries for enrollment (or reenrollment) in group health coverage for each plan year. The regulations require the TPA or issuer to send notice separate from, but to the extent possible contemporaneous with, the application materials, advising plan participants and beneficiaries that the TPA or issuer provides separate payments for contraceptive services at no

cost as long as the participant or beneficiary remains enrolled in the plan. 29 C.F.R. § 2590.715–2713A(d); 45 C.F.R. § 147.131.

The accommodation is intended to insulate eligible nonprofit religiously affiliated organizations and their group health plans from having to "contract, arrange, pay or refer for contraceptive coverage." 78 Fed.Reg. at 39876. "[B]ecause the payments for contraceptive services are not a group health plan benefit ... th[e] policy ensures that eligible organizations and their plans do not contract, arrange, pay, or refer for contraceptive coverage, and that such coverage is expressly excluded from their group health insurance policies." *Id.*

Neither the issuer nor the TPA that has contracted with the employer to provide the group health plan may refuse to pay for the contraceptive benefits. On receiving the copy of the self-certification, the TPA may, however, decide not to enter into, or remain in, a contractual relationship with the eligible organization to provide administrative services for the plan. 29 C.F.R. § 2590.715–2713A(b)(2) ("If a third party administrator receives a copy of the self-certification ... and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services[.]") But to comply with the ACA and the companion provisions in ERISA and the Code, the eligible religious organization is prohibited from: (1) directly or indirectly interfering with a TPA's efforts to provide or arrange separate payments for contraceptive

services for participants or beneficiaries in the plan; and (2) directly or indirectly seeking to influence a TPA's decision to provide or arrange such payments. 29 C.F.R. § 2590.715–2713A(b)(1)(iii).

A religious organization eligible for the accommodation has choices to make by January 1, 2014. It may violate the mandate and incur penalties of $100 per day for each affected individual, 26 U.S.C. § 4980D(b)(1); it may violate the law by discontinuing all health-plan coverage for employees at a cost of $2,000 per employee, *id.* § 4980H(c)(1);[3] or it may self-certify that the organization qualifies for the accommodation. A TPA for a church plan not subject to ERISA that receives a self-certification from the eligible religious organization also has choices. It may discontinue participation in the church plan; it may refuse to change its coverage and expose the employer to ACA penalties; or it may help the employer with the accommodation by paying for requested contraceptive services.

In *Priests for Life*, the government argued that the $100 dollar tax penalty would not apply to the plaintiffs who refused the accommodation because their insurers would have to provide insurance coverage as required by law, including contraceptive coverage. *Priests for Life*, —— F.Supp.2d at —— n. 2, 2013 WL 6672400, *3 n. 2 (citing 42 U.S.C. §§ 300gg–13; 300gg–22; 76 Fed.Reg. 46,621,623 (Aug. 3, 2011)). But, as the court recognized in that case, the plaintiffs would still suffer the harm they alleged

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[3] The government has postponed the application of this penalty until 2015. *See* Docket Entry No. 70-2 ¶ 68.

because they would be left paying for the objectionable coverage. Additionally, though not slated for effect until 2015, the $2,000–per–employee fine would apply to employers who fail to *offer the opportunity to enroll* in the minimum coverage. 26 U.S.C. § 4980H(a). So if the plaintiffs refused the accommodation in addition to not providing the coverage, it appears that the insurer would have to force-place the insurance, which would expose the plaintiffs to severe administrative penalties.

C. The Parties' Arguments on the Impact of the Accommodation

The plaintiffs allege that the accommodation violates the Religious Freedom Restoration Act because it places a substantial burden on the freedom to follow the commands of their religion. The plaintiffs argue that self-certification facilitates access to free emergency contraceptives, in direct violation of the religious commandment that they protect innocent life from the moment of conception until death. The accommodation requires each plaintiff to provide a copy of the "self certification to the plan's health insurer (for insured health plans) or a third party administrator (for self-insured plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement."(Docket Entry No. 107–1, Ex. E–1). "This certification is an instrument under which the plan is operated." (*Id.*). The plaintiffs object to "designating" their TPA or insurer as administrators for their employees to receive emergency contraceptive benefits without cost. The self-certification notifies the TPA or issuer of their obligations to provide contraceptive-coverage benefits to employees otherwise covered by the plan

and to notify the employees of their ability to obtain these benefits. The plaintiffs argue that by requiring them to comply with the self-certification requirements, the government's accommodation makes them facilitate and trigger free access to emergency contraceptives for their employees. The plaintiffs argue that the accommodation forces them to take actions that make them complicit in what they believe to be immoral conduct, coerced by the threat of ruinous fines if they do not fill out the self-certification and provide it to their issuer or TPA.

The government does not contend that the plaintiffs' religious beliefs about abortion, abortifacients, or forced complicity through facilitation are insincerely held, unreasonable, or "fringe." Instead, the government argues that the accommodation does not require the plaintiffs to do much and does not require more than they were already doing in different contexts, and is therefore not burdensome at all. In the alternative, the government argues that should the court find a burden on the plaintiffs' religious exercise, the court should find the burden *de minimis* because the "real" actions that the plaintiffs find objectionable are independent actions taken by third parties. The government contends that the "forced" act of self-certification is too attenuated and removed from whether any employee receives free emergency contraceptives though the plaintiffs' TPA or issuer to impose a substantial burden that could violate RFRA.

II. The Legal Standards

To obtain a preliminary injunction, the plaintiffs must establish "(1) a substantial likelihood of success

on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir.2011); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir.2008).

Summary judgment is appropriate if "no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc). "The movant bears the burden of identifying those portions of the record it believes demonstrates the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir.2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by " 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *See Celotex*, 477 U.S. at 325, 106 S.Ct. 2548. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp.*

Co., 402 F.3d 536, 540 (5th Cir.2005) (citation omitted).

In deciding a motion for summary judgment, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Connors v. Graves*, 538 F.3d 373, 376 (5th Cir.2008). When the moving party has met its Rule 56burden, the nonmoving party must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir.2007). "This burden is not satisfied with some metaphysical doubt as to the material facts, by unsubstantiated assertions, or by only a scintilla of evidence." *Little*, 37 F.3d at 1075 (internal quotation marks and citations omitted). Factual controversies resolve in the nonmoving party's favor, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Id.*

III. Article III Standing

The government challenged HBU's standing in its reply in support of its motion to dismiss plaintiffs' claims. (Docket Entry No. 103). The government argues that it cannot enforce the mandate through HBU's TPA because HBU is self-insured through a church plan. (*Id.* at 5 (citing 29 U.S.C. §§ 1002(16), 1003(b)(2); 29 C.F.R. § 2510.3–16(b); 78 Fed.Reg. 39,870, 39,879–80 (July 2, 2013))). According to the government, "HBU remains eligible for the accommodation under the final regulation promulgated by [the government] and therefore need not contract, arrange, pay, or refer for contraceptive coverage. But its TPA need not provide separate payments[.]" At bottom, the government argues that

even though HBU will have to self-certify, that self-certification will not result in any enforceable objectionable action by the TPA.

3This standing argument is unpersuasive for the reasons set out in *Roman Catholic Archdiocese,* 2013 WL 6579764, at *6–*7; *but see Roman Catholic Archbishop of Washington v. Sebelius,* No 13–1441(ABJ), at 46–51, ——F.Supp.2d ——, 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (concluding that the plaintiff in a similar situation lacked standing because the government lacked the regulatory authority to penalize the plaintiff's TPA for not complying with the ACA's requirements). HBU's alleged injury-in-fact does not wholly depend on what its TPA may or may not be penalized for doing or not doing. Instead, HBU's injury arises from the fact that the accommodation requires it to comply with the self-certification steps or face severe penalties. As HBU argued in its reply to the standing argument, HBU is harmed when it has to fill out the form authorizing its TPA to provide coverage and payments for emergency contraceptives, designating its TPA as the administrator for no-cost-sharing contraceptive benefits, and informing the TPA of its statutory and regulatory obligations. The self-certification steps do not depend on whether the government currently has the ability to use the enforcement mechanism it has specified to punish the TPA if it does not comply with its statutory and regulatory obligations. That the government apparently missed a regulatory loophole and cannot currently penalize a TPA for a failure to follow the ACA's mandate does not eliminate what HBU must do or risk penalties, or eliminate what the ACA requires of both HBU and its TPA.

Similarly, HBU's standing does not turn on whether one of its employees actually seeks payment for emergency contraception, or whether HBU's TPA for a given year decides to end its contractual relationship with HBU. The government's present lack of ability to use the enforcement mechanism it specified if HBU's TPA refuses to provide what the ACA mandates and nonetheless maintains its relationship with HBU does not deprive HBU of standing in this case.[4]

IV. The Religious Freedom Restoration Act Claims

In 1990, the Supreme Court held that the "Free Exercise Clause of the First Amendment d[id] not prohibit governments from burdening religious

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[4] At the oral argument on the motion, HBU asked the rhetorical question: "I think the big question here is why is it so important for HBU to sign this form now, because under the defendants' approach, it's completely meaningless. They can't use it for anything.... What is the purpose of making HBU sign a form that doesn't mean anything and it doesn't mean anything so much that there's not even a wisp of Article III injury." (Tr. 46). The government responded that "the point of completing the self-certification form[ ] is that the regs provide that on all the accommodation he needs to do is self-certify, complete the requirement. And so although HBU's TPA isn't going to be required to make the payments, HBU itself is still subject to the contraceptive coverage requirement. [I]t [remains] eligible for the accommodation and that if it fills the self-certification form it then complies with the requirement also and so it also would not be subject to any of the enforcement scheme." (Tr. 102). The forced-choice of filling out the self-certification form or providing the coverage still exists. The form requires HBU to tell the TPA about its obligation to pay. That the government apparently missed a regulatory loophole for forcing the TPA to act does not affect HBU's standing.

practices through generally applicable laws." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (describing *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). In *Smith*, the Supreme Court also held that "the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws." *Id.* (citation omitted). Congress rejected the Supreme Court's *Smith* holdings when it passed the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.* Noting that *Smith*" virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," 42 U.S.C § 2000bb(a)(4), RFRA expressly "restore[d] the compelling[-]interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)[,] and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and [guaranteed] its application in all cases where free exercise of religion is substantially burdened" in order to "provide a claim ... to persons whose religious exercise is substantially burdened by government," § 2000bb(b)(1, 2). In other words, "the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability' " unless the government can satisfy the compelling-interest test. *O Centro*, 546 U.S. at 424, 126 S.Ct. 1211. (quoting § 2000bb–1(a)).

The plaintiffs have established a sincere religious belief that they cannot support, endorse, or facilitate

the use of emergency contraceptives. The plaintiffs have a sincerely held religious belief that any complicity in the procurement of what they consider to abortifacient drugs is a sin. The record contains ample evidence that plaintiffs have long professed that belief, fashioned the governance of their institutions around that belief, and that the belief is an important tenet of their faith and the mission of their institutions. The threshold inquiry under RFRA is whether the ACA's accommodation substantially burdens the exercise of that belief. *See Diaz v. Collins*, 114 F.3d 69, 71 (5th Cir.1997). If the court finds a substantial burden, the government must then show that the burden "is in furtherance of a compelling governmental interest" and that it "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb–1(b).

The issue currently dividing district courts is whether the court's inquiry is limited to the magnitude of the pressure the government exerts in compelling the plaintiffs to self-certify their objection and thereby facilitate the provision of no-cost-sharing emergency contraceptive services to their employees, as the plaintiffs contend, or whether the court may (or must) also examine from an objective perspective the nature or quality of the acts or behavior the government compels or pressures the plaintiffs to perform, as the government contends. *Compare Roman Catholic Archdiocese v. Sebelius*, 987 F.Supp.2d 232, 251, 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013) ("The Court cannot say that "the line [plaintiffs] drew was an unreasonable one. *Thomas*, 450 U.S. at 715, 101 S.Ct. 1425."), *with Priests for Life*, —F.Supp.2d at — —, 2013 WL 6672400, at *10 (D.D.C. Dec. 19,

2013) (finding that "Plaintiffs have not stated a prima facie case under RFRA" because objectively viewed, completing the self-certification form was not a substantial burden.").

A. Substantial Burden

RFRA does not define "substantial burden," but the statute refers to and adopts cases that control the analysis. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 (9th Cir.2008) (en banc) ("[T]he cases that RFRA expressly adopted and restored—*Sherbert, Yoder*, and federal court rulings prior to *Smith*—also control the 'substantial burden' inquiry."), *cert. denied*, 556 U.S. 1281, 129 S.Ct. 2763, 174 L.Ed.2d 270 (2009); *see also Merced v. Kasson*, 577 F.3d 578, 587–88 (5th Cir.2009) (beginning the "substantial burden" inquiry under TRFRA, the Texas RFRA analog, with a detailed analysis of *Sherbert* and *Yoder*). In *Sherbert*, "a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith." *Sherbert*, 374 U.S. at 399, 83 S.Ct. 1790. She subsequently failed to find alternative employment because she refused to work on Saturday, which prompted her to apply for unemployment benefits under South Carolina law. South Carolina law required applicants to show good cause for failing to accept available suitable work. All levels of administrative and state judicial review concluded that her religious objections to Saturday work did not amount to good cause. The Supreme Court reversed, holding that:

> [N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely

> from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404, 83 S.Ct. 1790.

In *Yoder,* members of the Old Order Amish religion and the Conservative Amish Mennonite Church did not enroll their 14–and 15–year–old children in public or private school, as Wisconsin's compulsory school-attendance law required. *Yoder,* 406 U.S. at 208–09, 92 S.Ct. 1526. They believed "that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life [and that] sending their children to high school ... would not only expose themselves to the danger of the censure of the church community [but also] endanger their own salvation and that of their children." *Id.* at 209, 92 S.Ct. 1526. They were subsequently convicted of violating the compulsory-attendance law and fined $5. *Id.* at 208, 92 S.Ct. 1526. The Wisconsin Supreme Court reversed and held that "the State had failed to make an adequate showing that its interest in 'establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion.'" *Id.* at 213, 92 S.Ct. 1526 (quoting 49 Wis.

2d 430, 447, 182 N.W.2d 539, 547 (1971)). The Supreme Court held that the

> impact of the compulsory-attendance law on respondents' practice of the Amish religion [wa]s not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to *perform acts* undeniably at odds with fundamental tenets of their religious beliefs.... [The compulsory-attendance law] carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.... [It] carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

Id. at 218, 92 S.Ct. 1526 (emphasis added) (internal citation omitted). Yoder speaks in terms of "fundamental tenets." RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. § 2000bb–2(4) (citing § 2000cc–5). That "definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Korte v. Sebelius*, 735 F.3d 654, 674 (7th Cir.2013).

"Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by threat of civil or

criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1069–70. In the RLUIPA context, the Fifth Circuit has explained that the government "substantially burdens a religious belief" when it " 'truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.' " *Moussazadeh v. Texas Dept. of Criminal Justice*, 703 F.3d 781, 793 (5th Cir.2012) (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir.2004)).[5]

The courts recognize that a religious exercise may be substantially burdened by government action that compels a plaintiff to do something inconsistent with religious beliefs; forbids the plaintiff from doing something his religion requires; or indirectly pressures the plaintiff to act or refrain from acting in a way his religion requires. *See Korte*, 735 F.3d at 706 (Rovner, J., *dissenting*) (citations omitted) (describing three categories of substantial burden and aggregating cases). When the government forces people to do something their faith forbids to avoid punishment, including harsh fines, the government imposes a substantial burden. "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *See Thomas v. Review*

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[5] The government's focus on the twice-repeated word "significant" is misplaced because the Fifth Circuit defines a government action as significant when it "(1) influences the adherent to act i a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and on the other hand, following his religious beliefs." *Id.* (citing *Adkins*. 393 F.3d at 570).

Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981).

The issue in this and similar cases is not whether the government is directly compelling or putting substantial pressure on the religious organizations to do something that they find inconsistent with their religious beliefs. All agree that the penalties for failing to self-certify and refusing to provide no-cost-sharing contraceptive services to employees as part of the group health plan benefits are onerous. Nor do these cases raise the issue of whether the plaintiffs' religious beliefs are sincerely held. The cases are clear that once a court determines that the religious tenet or practice is based on sincerely held religious belief, the court is not free to assess whether it is a central, critical, or important part of that religion. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). The beliefs need not be longstanding, central to the claimant's religious beliefs, internally consistent, consistent with any written scripture, or reasonable from another's perspective. They need only be sincerely held. The plaintiffs clearly meet this requirement.

The government argues that not all government-compelled or government-forbidden action substantially burdens a religious belief: "De minimis burdens on the free exercise of religion are not of constitutional dimension." *Rapier v. Harris*, 172 F.3d 999, n. 2 (6th Cir. 1999) (citing *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 158 (5th Cir.1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981); *Windsor Park Baptist Church, Inc. v. Ark. Activities Ass'n*, 658 F.2d 618 (8th

Cir.1981)).[6] The government emphasizes *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), to develop the argument. In that case, Russell Kaemmerling, a federal prisoner, sought to enjoin the application of the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. §§ 14135–14135(e). That act directed the Bureau of Prisons to collect body-tissue samples to have a bank of DNA identifiers for prisoners convicted of certain felonies. Kaemmerling was an evangelical Christian who held the sincere religious belief that collecting and retaining DNA was "tantamount to laying the foundation for the rise of the anti-Christ" *Id.* at 673. He argued that DNA sampling, collection, and storage without any limit on use violated "God's temple, as represented by one's mortal body, willed with the Holy Spirit." *Id.* at 678. "Kaemmerling [made] abundantly clear that he does not challenge the collection of any particular DNA carrier-such as blood, saliva, skin, or hair-but rather that, regardless of the medium by which the government acquires access to his DNA, he objects to the government collecting his DNA information from any fluid or tissue sample they may recover." *Id.* The objection was not an objection to the Bureau of Prisons collecting tissue or body samples, but an objection to

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[6] *Rapier* and a long line of RLUIPA and free exercise cases have found *de minimis* burdens in circumstances subjecting prisoners to temporary or transient conditions. For example, in *Rapier*, "the unavailability of a non-pork tray for Mr. Rapier at 3 meals out of 810 d[id] not constitute more than a de minimis burden on Mr. Rapier's free exercise of religion. Mr. Rapier ha[d] not alleged a routine or blanket practice of denying him pork-free meals." This line of cases is inapposite.

the government's later action of extracting DNA information from those samples. *See id.*

The D.C. Circuit concluded that Kaemmerling did "not allege facts sufficient to state a substantial burden on his religious exercise because he cannot identify any 'exercise' which is the subject of the burden to which he objects." *Id.*at 679. The actions that offended Kaemmerling's sincerely held religious beliefs were not his actions, but the independent actions of third parties. There was only one action required of him, and he did not object to it. The court concluded that the link between Kaemmerling's own act of allowing a sample of his fluid or tissue to be taken—to which he did not object—and the independent acts of others extracting DNA from those cells—to which he did object—was too attenuated and removed. The court explained:

> The extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the [Bureau of Prisons] has taken his fluid or tissue sample (to which he does not object). The government's extraction, analysis, and storage of Kaemmerling's DNA information *does not call for Kaemmerling to modify his religious behavior in any way—it involves no action or forbearance on his part, nor [did] it otherwise interfere with any religious act in which he engages.* Although the government's activities with him fluid or tissue sample after the [Bureau of Prisons] takes it may offend Kaemmerling's religious beliefs, they [could not] be said to hamper his religious exercise because they do not

> "pressure [him] to modify his behavior and to violate his beliefs."

Id. at 679 (emphasis added) (quoting *Thomas*, 450 U.S. at 718, 101 S.Ct. 1425). Because Kaemmerling did not have to "modify his religious behavior," there was no burden, much less a substantial burden, on the exercise of his religion. *Id.* (citing *Bowen v. Roy*, 476 U.S. 693, 696–703, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (holding that the interference caused by the government's referring to a person using a social security number, which the person or her parents believe will " 'rob the spirit' of [the person] and prevent her from attaining greater spiritual power," is not a substantial burden because it does not "affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons.")).

When a plaintiff is compelled or pressured to engage in action that he does not object to on religious grounds, that compulsion or pressure does not require a modification of religious behavior and there is no actionable burden. That is true even if the plaintiff's action leads to acts by third parties, independent from what the plaintiff did, that the plaintiff does find religiously offensive.

Kaemmerling stated that "[a]n inconsequential or *de minimis* burden on religious practice does not rise to th[e substantial burden] level, nor does a burden on activity unimportant to the adherent's religious scheme." *Id.* at 678 (citing *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C.Cir.2002)). But because the D.C. Circuit concluded that there was no modification of any religious behavior on

Kaemmerling's part, the "*de minimis* burden on religious practice" language appears to be dicta. And the case the D.C. Circuit cited for that proposition, *Levitan*, was not a RFRA case and was decided using approaches that do not apply under RFRA.

In *Levitan*, the appellants were federal prisoners and Catholics. A prison rule prevented them from consuming small amounts of wine during Communion at mass. The plaintiffs sued under the Free Exercise Clause of the First Amendment. The D.C. Circuit in *Levitan* noted that the plaintiffs did not bring a RFRA challenge. The statutory framework of RFRA is different than the constitutional framework of the First Amendment as applied to prisoners in 2002. In *Levitan*, the court, without citation, stated that the "challenged rule must also burden a central tenet or important practice of the litigant's religion." The court, despite the Supreme Court's warning to the contrary in *Smith*, explained:

> Nonetheless, it is sometimes the case that litigants can make no credible showing that the affected practice *is either central or important to their religious scheme. In such cases,* the *de minimis* burden imposed by the challenged law is not constitutionally cognizable. In other cases, in which the practice at issue is indisputably an important component of the litigants' religious scheme, such evidence may be relevant to overcome any claim that the impact of the challenged law is *de minimis*. Moreover, a rule that bans a practice that is not central to adherent's

> religious practice might nonetheless impose a substantial burden if the practice is important and based on a sincere religious belief.

Levitan, 281 F.3d at 1321 (emphasis added) (internal quotation marks and citations omitted). RFRA seems to foreclose the analysis that the D.C. Circuit used to conclude that some violations are *de minimis*. Whether the affected practice is central or important to a religion is not for the court to determine. "Recall that [under RFRA's statutory framework] 'exercise of religion' means 'any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief.' " *Korte*, 735 F.3d at 682 (citing 42 U.S.C. § 2000cc–5(7)(A)). The definition of *de minimis* burden as originally used in the D.C. Circuit meant a burden that affected an unimportant or tangential religious practice. *Levitan* suggests that evidence of the importance of a practice to a religious scheme overcomes a claim that a law requires a *de minimis* burden. Finally, the D.C. Circuit recognized that a rule that bans an important, sincere belief would be substantial.

The government's reliance on *Kaemmerling* appears misplaced. First, it is unclear how the *de minimis* analysis applies in the RFRA context. Second, the plaintiffs have articulated an important and sincere religious belief that "overcome[s] any claim that the impact of the challenged law is *de minimis*." *Levitan*, 281 F.3d at 1321. Finally, and perhaps most importantly, the burden in *Kaemmerling* was insubstantial under RFRA because he did not object to what the government

forced *him* to do.[7] In the present case, of course, the plaintiffs vigorously object on religious grounds to the act that the government requires them to perform, not merely to later acts by third parties. And as discussed in more detail below, in the present case, the acts that follow from what the plaintiffs are required to do are not as independent or removed as they were in *Kaemmerling*.

Fifth Circuit case law also supports the conclusion that the RFRA substantial-burden inquiry does not allow the court to discard the plaintiff's view that a government-compelled or government-coerced modification is substantial. The Fifth Circuit considers whether a *burden* is insubstantial, that is, the compelling or coercive mechanism itself; not whether the modification is substantial.

In *Walsh*, the plaintiffs challenged the Louisiana High School Athletic Association rule that "upon the completion of elementary or junior high school, a student is eligible to participate immediately in interscholastic athletic competition only at a high school within his home district." *Walsh*, 616 F.2d at 155. There was also a transfer rule, "a student is ineligible to participate in interscholastic athletic competition for a period of one year if he matriculates at a high school outside of his home district after completing elementary or junior high

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[7] The D.C. Circuit's decision upholding a for-profit corporation's challenge to the ACA's contraceptive mandate, *Gilardi v. U.S. Dep't of Health and Human Servs.*, 733 F.3d 1208, 1217, cited *Kaemmerling* only three times, once rejecting the government's argument that the burden identified was too remote and too attenuated to be substantial.

school." *Id.* These rules were aimed at curbing recruitment of young athletes. The plaintiffs could not participate in interscholastic athletic competitions because they attended the only Lutheran high school in greater New Orleans operated by the Missouri Synod, and the school was outside their home district. The plaintiffs brought a free exercise challenge under the First Amendment. The Fifth Circuit rejected the argument:

> The rule merely prevents a child from participating in interscholastic athletic competition during his ninth grade year. Even so, the ambit of the rule is limited. It does not forbid a student from participating in all athletic activities. The transfer rule does not prevent ninth graders at Lutheran High School from participating in intramural athletic competition. Neither does the rule prohibit such students from trying out for or from practicing with the Lutheran High School varsity athletic teams. It simply prevents a child from representing Lutheran High School in an interscholastic athletic contest for a period of one year. The burden on the free exercise of religion is *de minimis*.

Id. at 158. The analysis focused on the nature and extent of the coercive pressure, finding that it was not substantial, and did not examine the decision to attend a religious school. *See also Tagore v. U.S.*, 735 F.3d 324, 330 (5th Cir.2013) ("Assuming, again, that Tagore succeeds in establishing a sincerely held religious belief that mandates her wearing a 3–inch kirpan blade, the remaining predicate to a prima facie RFRA case is whether the [restriction on blades

over 2.5 inches] substantially burdened her religious practice. This is not a serious hurdle: she gave up her job rather than wear a shorter-bladed kirpan." (citations omitted)).; accord *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) ("The challenged legislation in the present case does not require appellee and his class to make any choice comparable to that required of the petitioners in Gillette. The withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if, indeed, any burden exists at all."); *Braunfeld v. Brown*, 366 U.S. 599, 606, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (using "[s]tatutes which [both] tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church" as example of insubstantial burden.); *Navajo Nation*, 535 F.3d at 1070 (holding that the burden was insubstantial when there was no government-coerced action or government-forced choice between the plaintiffs practicing their religion or receiving a government benefit).

The case law supports the conclusion that the requirement of a "substantial" burden focuses on the nature and effect of the government restraint. The religious organization plaintiffs have shown a sincerely held religious belief that the court cannot second-guess. The plaintiffs have also shown that if they do not comply with a certain requirement that they believe offends that belief, they will face onerous fines. The government does not dispute that the fines are onerous. But the government does

dispute that the requirement can reasonably be said to require a religiously offensive or burdensome act.

This court agrees that the inquiry does not end with a finding that the plaintiffs may face onerous fines. But the unsettled issue does not appear to be whether the court must accept the plaintiffs' subjective view of whether they are compelled or pressured to act in a religiously offensive way, or whether the court must examine the nature and quality of the act to gauge whether it is offensive from some kind of objective perspective. The case law provides an answer to this question: the plaintiffs' view of whether the act is religiously offensive controls. The dispute appears instead to focus on two related, but distinct, antecedent questions. The first question is whether what the plaintiff religious organizations object to is an act that *they* are compelled or pressured to do and that they were not already doing. The second question is whether what the religious organizations are required to do is sufficiently linked to what they *themselves* have identified as offensive to their religious faith to be burdensome. If what the organizations identify as the religiously offensive acts are independent acts of third parties too far removed from the organizations' own conduct, then there may be no substantial burden. But under RFRA case law, if the plaintiffs are themselves compelled or pressured by threat of punitive fines to: 1) themselves take or forbear from an action; and 2) it is their own action or forbearance that they find religiously offensive, there is a substantial burden.

The plaintiffs have demonstrated that the mandate and accommodation will compel them to

engage in an affirmative act and that they find this act—their own act—to be religiously offensive. That act is completing and providing to their issuer or TPA the self-certification forms. The act of self-certification does more than simply state the organization's religious objection to covering or paying for its employees to get emergency contraception. The self-certification act designates the organization's TPA as the TPA for contraception coverage. The act tells the TPA or issuer that it must provide the organization's employees coverage that gives those employees free access to emergency contractive devices and products. That act tells the TPA or issuer that it must notify the employees of that benefit.

The government argues that the plaintiffs were previously telling their TPAs or issuers not to provide coverage for emergency contraception and were previously declaring their religious objection to such devices and products, in a variety of ways. At least one court has found that the self-certification form does not require the religious organizations to do anything they were not already doing. *See Priests for Life,* —— F.Supp.2d ——, 2013 WL 6672400 (D.D.C. Dec. 19, 2013). But the self-certification form requires the organizations to do much more than simply protest or object. The purpose of the form is to enable the provision of the very contraceptive services to the organization's employees that the organization finds abhorrent. The form designates the organization's chosen TPA as the administrator for such benefits and requires the organization's chosen issuer or TPA to pay for the religiously offensive contraceptive services. The purpose and effect of the form is to accomplish what the

organization finds religiously forbidden and protests. If the organizations do not act in the way the accommodation requires, they face onerous fines. On January 1, 2014, the plaintiffs will be compelled or pressured to do something that they did not have to do on December 31, 2013.

The answer to the first question—does the accommodation compel or pressure the plaintiff religious organizations themselves to perform an act that they were not already doing—is clearly yes.

Citing *Kaemmerling* and *Thomas*, the government contends that RFRA is "a shield, not a sword" and that the plaintiffs cannot decide "what does and does not impose a substantial burden" on their beliefs. Those cases do not stand for such a robust proposition. Kaemmerling did not have to modify his behavior by engaging in an act he found religiously offensive. The plaintiff organizations do. *Thomas* instructs courts that it is the plaintiffs' decision on whether the acts they are required to engage in are religiously offensive, and that the courts are not to take it on themselves to decide whether the plaintiffs' decision was objectively reasonable. *See Thomas*, 450 U.S. at 715, 101 S.Ct. 1425. The answer to the second question—do the plaintiffs find the self-certification they are required to do religiously offensive because it makes them complicit in providing their employees with free and ready access to emergency contraceptives—is also yes.

The government focuses on this second question, the role of the plaintiffs' own act in leading to the religiously offensive result, in arguing that the act of self-certifying is too attenuated from the provision of

the contraceptive services to be a substantial burden. "Cases that find a substantial burden," the government argues, "uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity." One problem with this argument is that there is a burden on the plaintiffs, to fill out the self-certification form and comply with the related requirements, or pay a fine. A second problem is the assumption that once the self-certification is completed, the plaintiffs' involvement ends, and that removes or insulates the plaintiffs from providing the emergency contraceptive services they find religiously objectionable.

As to the first problem, the case law supports the conclusion that the accommodation's imposition on the plaintiffs of a required act—self-certification—that they find religiously offensive, coerced or pressured by exposure to punitive fines, meets the substantial burden test. The government's position that there is no direct burden imposed because the plaintiffs do not themselves have to arrange or pay for emergency contraceptives would require this court to make several inferences not supported by the case law. RFRA case law does not allow a court to substitute its judgment on whether the act the plaintiffs are required or forbidden to perform is or is not religiously offensive. *See Thomas,* 450 U.S. at 715, 101 S.Ct. 1425. It is insufficient to dismiss or discount the plaintiffs' religious objection to the act or forbearance based on the amount of work involved, as long as an act or forbearance on the plaintiffs' part is compelled or coerced by the government, including by the threat of large fines. The fact that filling out the self-certification form will take little time or effort does not determine whether it is religiously

offensive. *See, e.g., Roman Catholic Archdiocese,* 987 F.Supp.2d at 249, 2013 WL 6579764, at *13 ("This argument—which essentially reduces to the claim that completing the self-certification places no burden on plaintiffs' religion because 'it's just a form'—finds no support in the case law.").

As to the second problem, the allegations and undisputed facts in the record fail to support the government's argument. This is not a case in which the religiously offensive consequence—enabling free access to contraceptive devices and products—occurs only after, and independently of, any act or forbearance on the plaintiffs' part. Contrary to the conclusion reached in *Priests for Life,* —— F.Supp.2d ——, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), the plaintiffs' self-certification and the group health plans they put into place are necessary to their employees' obtaining the free access to the contraceptives that the plaintiffs find religiously abhorrent. The plaintiffs' acts are not sufficient for their employees to achieve this access, but the plaintiffs' acts are necessary to this result, and that is enough for RFRA.

The plaintiffs admit that the analysis would be different if the only acts that followed their self-certification were the acts of their employees seeking free access to emergency contraception. If, for example, the only consequence of self-certification was that employees had to go to a government clinic that dispensed free emergency contraception, there would be no substantial burden on the plaintiffs. The religiously offensive conduct would be independent acts of third persons. But under the accommodation, the plaintiffs' employees would obtain coverage and

no-cost-sharing payments for emergency contraception only because the employees are otherwise covered by the plaintiffs' group health plan. The government has taken significant steps to separate this payment from the group health plan. But the coverage and payment for employees to obtain emergency contraceptive products and devices is because those employees are covered by the group health plan that the plaintiffs put into place. The coverage and payment occurs through the TPA the plaintiffs contracted with and who they have been required to designate as the administrator for contraceptive services through the self-certification form, or through the plaintiffs' issuer.

Both the TPA and issuer provide coverage and payment because the plaintiffs self-certify their unwillingness to do so through the plan itself. But the plaintiffs' employees can obtain such coverage and payment only as long as they are the plaintiffs' employees and on the plaintiffs' group health plan. It is the insurance plan that the religious-organization employer put into place, the issuer or TPA the employer contracted with, and the self-certification form the employer completes and provides the issuer or TPA, that enable the employees to obtain the free access to the contraceptive devices that the plaintiffs find religiously offensive.

Even accepting that the government has succeeded in preventing any payment by the religious organization for the religiously offensive devices, there is a causal link between the acts the plaintiffs must do under the accommodation and the provision of contraceptive devices and products to employees on a no-cost-sharing basis. The effort to

accommodate the religious organizations by reducing their involvement in providing their employees with such access to emergency contraception did not end the plaintiffs' involvement so as to avoid required acts on their part that offend their faith.

The court finds and concludes that the plaintiffs have established that they will likely succeed in showing a substantial burden under RFRA.

B. A Compelling Interest and the Least Restrictive Means

RFRA states that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person ... is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). This "compelling interest test" is described as applying "strict scrutiny."

The cases identify two interests the government asserts as compelling. The first is promoting public health. The second is ensuring equal access by women to health care services. The courts have consistently concluded that it is not enough under RFRA to identify " 'broadly formulated interests" that justify the "general applicability of government mandates.' " *Hobby Lobby*, 723 F.3d at 1143 (quoting *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211). Instead, a court must " 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.' " *Id.* (*O Centro*, 546 U.S. at 431, 126 S.Ct. 1211). Under RFRA, it is not enough for the government to point to how the ACA as a whole may protect or promote public health. The issue is whether denying the limited religious

exemption from emergency contraceptives that potentially prevent implantation of fertilized eggs to eligible institutions like plaintiffs would undermine a compelling interest in protecting health. "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.' " *O Centro*, 546 U.S. at 431–32, 126 S.Ct. 1211.

The government has not clearly shown how denying these plaintiffs an exemption from the mandate to pay for employees to have no-cost-sharing access to emergency contraceptives would undermine a compelling interest in protecting women's health.[8] But even assuming that the

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[8] Nor does the record justify finding a compelling interest based on the government's slippery-slope argument that if the exemption for religious employers were extended to these plaintiffs, the government would be unable to enforce the regulations effectively. That argument depends on a showing that uniformity is critical such that granting the requested exemptions would undermine effective administration. *See, e.g., United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (rejecting a claimed exception to the obligation to pay Social Security taxes in part because "mandatory participation is indispensable to the fiscal vitality of the social security system" and that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."); *Hernandez v. Commissioner*, 490 U.S. 680, 700, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). There are two problems with applying this argument to the religious exemption the plaintiffs seek. First, there are many secular and religious exemptions already built into the ACA. Although the government justifies each, such as

government has shown a compelling interest in preventing unwanted pregnancies and related health problems and in making emergency contraceptive devices readily available to as many women as possible because these devices are particularly effective in addressing specific health problems (such as effective post-intercourse pregnancy prevention when pre-intercourse drugs, devices, or products are medically contraindicated or ineffective), the government is also required to show that it has adopted the "least restrictive means" of serving that interest than the mandate-and-accommodation provides. Similarly, assuming that the government

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the exemptions for grandfathered plans and for statutorily defined religious employers (as opposed to religious nonprofit organizations), the number of exemptions seems inconsistent with a showing that granting the exemption the plaintiffs seek would undermine administrative efficacy. This is different from holding, as some courts have, that the existence of secular exemptions, such as for grandfathered plans or for small employers, undermines the government's ability to show that it is protecting a compelling interest in refusing an additional, religious exemption. *See, e.g., Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222–23. The fact that there are other exemptions does not in itself preclude the government from being able to show a compelling interest in applying the law to a particular religious organization or claimant. The point here is that if the government is opposing a RFRA exemption by asserting a general need for uniformity, the existence of a number of exemptions makes that more difficult.

More important, the government's argument for uniformity does not depend on any specific showing relating to the ACA or the accommodation. Rather, it is based on general slippery-slope concerns that could be raised in response to any RFRA claim to an exception to a generally applicable law. Categorically relying on a need for uniformity is not sufficient under RFRA, but it is what the government has done here.

may be able to show a compelling interest in preventing sex discrimination in the provision of health care, the government must then show that the mandate-and-accommodation are the least restrictive means of meeting that interest.

The courts have identified several "less restrictive means" of serving the interests the government has identified than a total denial of the religious exemption request. One is to have the government provide the contraceptive services or coverage directly to those who want them but cannot get them from their religious-organization employers. *See, e.g., Korte,* 735 F.3d at 686. If the numbers seeking such services is small because of the organizations' emphasis on hiring employees who subscribe to the same religious beliefs, the added tax consequence to the public from the religious-organization employers' refusal to pay would also be reduced. *See Lee,* 455 U.S. at 252, 102 S.Ct. 1051 (rejecting a religious exemption from the tax laws on the basis that it would be too burdensome on taxpayers generally to pay taxes for those refusing to do so). Another alternative would be to have the government work with third parties to provide emergency contraception without requiring the plaintiffs' active participation. *Korte,* 735 F.3d at 686. Still another alternative could be to have the employee self-certify on an as-needed basis that their employer is a religious nonprofit that does not provide coverage for such services. The plaintiffs identify other possible means, such as providing tax credits to employees who have to purchase the emergency contraception. The government has not explained why the mandate and accommodation is the least restrictive means of advancing a compelling government interest.

The result is to find and conclude that plaintiffs have shown both a substantial likelihood of succeeding on the merits of their claim that the mandate and accommodation substantially burden the plaintiffs' religious exercise and the absence of a genuine factual dispute material to this determination. The government has failed to show that the mandate and accommodation are the least restrictive means of advancing a compelling government interest.

This result is neither simply reached nor one-sided in consequence. Employees of religious organizations currently unable to claim the exemption, who do not share their employer's anti-contraception beliefs, will not receive the statutory benefit of emergency contraception coverage without cost-sharing. Employees who need emergency contraceptives will face their own unhappy choice between paying costs they would not incur in the absence of the exemption or risking an unwanted pregnancy. This burden and choice, which already exists for employees of religious employers, would be extended to nonprofit religious organizations. The ACLU as amicus argues that exempting the plaintiff organizations from the mandate and denying their employees emergency contraceptive coverage without cost sharing effectively imposes the plaintiffs' religious beliefs on nonbelieving employees and shifts the costs of the accommodation from accommodated believers to nonadherents and other third parties. *See, e.g., Sherbert,* 374 U.S. at 409, 83 S.Ct. 1790; *see also Korte,* 735 F.3d at 719–20 (Rovner, J., dissenting). To the extent this assumes that an employee would have an enforceable private right to ACA coverage, this is unclear. And

even recognizing the burden that granting the exemption imposes, it does not require employees to violate their own religious beliefs or abridge their religious liberties. Nor does the existence and recognition of this burden relieve the government of showing that the mandate and accommodation are the least restrictive means of serving a compelling interest in avoiding the burden by giving employees free access to emergency contraceptives.

V. The Remaining Requirements for Injunctive Relief and Summary Judgment

A. Injunctive Relief

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Opulent Life Church v. City of Holly Springs,* 697 F.3d 279, 295 (5th Cir.2012) (quotation omitted). The same is true for violations of RFRA; showing a likelihood of success on the merits shows irreparable injury. *O Centro,* 389 F.3d 973, 995 (10th Cir.2004), *aff'd, O Centro,* 546 U.S. at 439, 126 S.Ct. 1211 ("[The plaintiff] would certainly suffer an irreparable harm assuming of course that it is likely to succeed on the merits of its RFRA claim."); *see also Tyndale House Publishers, Inc. v. Sebelius,* 904 F.Supp.2d 106, 129 (D.D.C. 2012); *Legatus v. Sebelius,* 901 F.Supp.2d 980, 987 (E.D. Mich. 2012).

The plaintiffs' injury outweighs the government's injury if an injunction is granted. Granting the injunction preserves the status quo, which the government has failed to show a compelling interest in changing. *See Roman Catholic Archdiocese,* 987 F.Supp.2d 232, 2013 WL 6579764 (citing *Cornish v.*

Dudas, 540 F.Supp.2d 61, 65 (D.D.C.2008)); *see also Tyndale House Publishers*, 904 F.Supp.2d at 129–30 (D.D.C.2012).

The public interest weighs in favor of granting the injunction. Protecting constitutional rights and the rights under RFRA are in the public's interest. "Congress [has] obligated itself to explicitly exempt later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps later federal statutes when RFRA has been violated." *Hobby Lobby*, 723 F.3d at 1114, 1146. This is why some have equated RFRA to a constitutional right. *Id.* Having decided not to explicitly exempt the ACA from RFRA, it is in the public's interest to enjoin the application of federal statutes that violate RFRA.

The plaintiffs are entitled to an injunction preventing the enforcement of the mandate and accommodation to them, their plans, their TPAs, and their issuers.

B. Summary Judgment

The plaintiffs have shown that, based on the undisputed facts in the record, the accommodation violates RFRA as a matter of law. The plaintiffs are entitled to summary judgment on their RFRA claims. The government's cross-motion for summary judgment on the absence of a RFRA violation is denied.

VI. Conclusion

The court grants the plaintiffs' motion for summary judgment on the RFRA claim and denies the government's cross-motion for summary-judgment on the RFRA claim. The court denies both

the plaintiffs' and government's cross-motions on the constitutional claims as moot and without prejudice.

The government is enjoined from applying or enforcing the regulations that require the plaintiffs, their health plans, TPAs, or issuers, to provide or execute the self-certification forms that enable or require the TPA or issuer to provide health insurance coverage for the plaintiffs' employees for FDA-approved emergency contraceptive devices, products, or services under the requirements imposed in 42 U.S.C. § 300gg–13(a)(4), Pub.L. 11–148, § 1563(e)-(f), as well as the application of the penalties found in 26 U.S.C. §§ 4980D & 4980H, and 29 U.S.C. § 1132. An order of injunction will separately issue.

APPENDIX D

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 300gg-13(a)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

26 U.S.C. § 4980D provides:

§ 4980D. Failure to meet certain group health plan requirements

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first

occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.— Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination,

the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the

satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.— In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to

willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the

extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H provides:

§ 4980H. Shared responsibility for employers regarding health coverage.

(a) Large employers not offering health coverage.— If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost- sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its full- time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost- sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.— The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.— All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the

average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-

sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(b) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of—

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(A) Rounding.—If the amount of any increase

under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost- sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

29 U.S.C. §1002(16) provides:

§ 1002. Definitions.

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services.

(1) Services—(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits. [Reserved]

(3) Out-of-network providers. [Reserved]

(4) Reasonable medical management. [Reserved]

(5) Services not described. [Reserved]

(b) Timing. [Reserved]

(c) Recommendations not current. [Reserved]

(d) Effective/applicability date. April 16, 2012.

26 C.F.R. § 54.9815–2713A provides:

§ 54.9815–2713A. Accommodations in connection with coverage of preventive health services.

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) [Reserved]. For further guidance, see § 54.9815–2713AT(b).

(c) Contraceptive coverage—self-insured group health plans—(1) [Reserved]. For further guidance, see § 54.9815–2713AT(c)(1).

(2) Payments for contraceptive services. (i) [Reserved]. For further guidance, see § 54.9815–2713AT(c)(2)(i) introductory text.

(iii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713,

2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this

paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(1) Reliance—insured group health plans. (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) [Reserved]. For further guidance, see § 54.9815-2713AT(f).

26 C.F.R. § 54.9815-2713AT provides:

§ 54.9815-2713AT Accommodations in connection with coverage of preventive health services (temporary).

(a) [Reserved]. For further guidance, see § 54.9815-2713A(a).

(b) Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self- certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must

include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the

following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self- certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more

plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and

Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must—

(ii) [Reserved]. For further guidance, see §54.9815–2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see §54.9815–2713A(d).

(e) [Reserved]. For further guidance, see §54.9815–2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. §§ 2510.3-16 provides:

§ 2510.3-16 Definition of "plan administrator."

(a) In general. The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponsor, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, if the eligible organization provides a copy of the self-certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter to a third party administrator, the self-certification shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and Human Services of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

(c) A third party administrator that becomes a

plan administrator pursuant to this section shall be responsible for--

(1) Complying with section 2713 of the Public Health Service Act (42 U.S.C. 300gg-13) (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to coverage of contraceptive services. To the extent the plan contracts with different third party administrators for different classifications of benefits (such as prescription drug benefits versus inpatient and outpatient benefits), each third party administrator is responsible for providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to the classification or classifications of benefits subject to its contract.

(2) Establishing and operating a procedure for determining such claims for contraceptive services in accordance with § 2560.503-1 of this chapter.

(3) Complying with disclosure and other requirements applicable to group health plans under Title I of ERISA with respect to such benefits.

29 C.F.R. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the

following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health

Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual.

The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office

visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered

by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified

in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years beginning on or after September 23, 2010. See § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

29 C.F.R. § 2590.715-2713A provides:

§ 2590.715-2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans—

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self- certification must include notice that obligations of the third party administrator are set forth in

§ 2510.3-16 of this chapter and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), shall send a separate notification to each of the plan's third party administrators informing the third party administrator that the

Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under § 2510.3-16 of this chapter and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of

this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self- certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans –

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with

§ 2590.715-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the

basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services --(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any

contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for

contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.130 provides:

§ 147.130 Coverage of preventive health services. (a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph

(c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in

paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the

office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for

items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later, for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee

before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131 provides:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a

nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years

with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of

Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must

provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has

certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations

under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

APPENDIX E

EBSA FORM 700– CERTIFICATION

(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this	

certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)) that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and

correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR

2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at:

http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record

retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

No. 15-35

In the Supreme Court of the United States

EAST TEXAS BAPTIST UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under federal law, health insurers and employer-sponsored group health plans generally must cover certain preventive health services, including contraceptive services prescribed for women by their doctors. Petitioners object to providing contraceptive coverage on religious grounds and are eligible for a regulatory accommodation that would allow them to opt out of the contraceptive-coverage requirement. Petitioners contend, however, that the accommodation itself violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., by requiring third parties to provide their employees with separate contraceptive coverage after petitioners opt out. The question presented is:

Whether RFRA entitles petitioners not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from arranging for third parties to provide separate coverage to the affected women.

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In the Supreme Court of the United States

No. 15-35

EAST TEXAS BAPTIST UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 793 F.3d 449. The opinion of the district court (Pet. App. 31a-88a) is reported at 988 F. Supp. 2d 743.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2015. The petition for a writ of certiorari was filed on July 8, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124

Stat. 119,[1] seeks to ensure universal access to quality, affordable health coverage. Some of the Act's provisions make insurance available to people who previously could not afford it. See *King* v. *Burwell*, 135 S. Ct. 2480, 2485-2487 (2015). Other reforms seek to improve the quality of coverage for all Americans, including the roughly 150 million people who continue to rely on employer-sponsored group health plans. See, *e.g.*, 42 U.S.C. 300gg-11 to 300gg-19a.[2]

One of the Act's reforms requires insurers and employer-sponsored group health plans to cover immunizations, screenings, and other preventive services without imposing copayments, deductibles, or other cost-sharing requirements. 42 U.S.C. 300gg-13. Congress determined that broader and more consistent use of preventive services is critical to improving public health and that people are more likely to obtain appropriate preventive care when they do not have to pay for it out of pocket. 78 Fed. Reg. 39,872 (July 2, 2013); see *Priests for Life* v. *HHS*, 772 F.3d 229, 259-260 (D.C. Cir. 2014) (*PFL*), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015).

The Act specifies that the preventive services to be covered without cost-sharing include "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), a component of the Department of Health and Human Ser-

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[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[2] See Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2014 Annual Survey* 56 (2014), http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report (*Health Benefits Survey*).

vices (HHS). 42 U.S.C. 300gg-13(a)(4); see *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (*Hobby Lobby*). Congress included a specific provision for women's health services "to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services." *PFL*, 772 F.3d at 235; see *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring).

In identifying the women's preventive services to be covered, HRSA relied on recommendations from independent experts at the Institute of Medicine (IOM). *Hobby Lobby*, 134 S. Ct. at 2762. IOM recommended including the full range of contraceptive methods approved by the Food and Drug Administration (FDA), which IOM found can greatly decrease the risk of unintended pregnancies, adverse pregnancy outcomes, and other negative health consequences for women and children. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 10, 109-110 (2011) (*IOM Report*). IOM also noted that "[c]ontraceptive coverage has become standard practice for most private insurance and federally funded insurance programs" and that "health care professional associations"—including the American Medical Association and the American Academy of Pediatrics—"recommend the use of family planning services as part of preventive care for women." *Id.* at 104, 108.

Consistent with IOM's recommendation, the HRSA guidelines include all FDA-approved contraceptive methods, as prescribed by a doctor or other health care provider. 77 Fed. Reg. 8725 (Feb. 15, 2012); see *Hobby Lobby*, 134 S. Ct. at 2762. Accordingly, the regulations adopted by the three Departments re-

sponsible for implementing the relevant provisions of the Affordable Care Act (HHS, Labor, and the Treasury) include those contraceptive methods among the preventive services that insurers and employer-sponsored group health plans must cover without cost-sharing. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury).[3]

2. Recognizing that some employers have religious objections to providing contraceptive coverage, the Departments developed "a system that seeks to respect the religious liberty" of objecting organizations "while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives" as other women. *Hobby Lobby*, 134 S. Ct. at 2759; see 77 Fed. Reg. 16,503 (Mar. 21, 2012). That regulatory accommodation is available to any nonprofit organization that holds itself out as a religious organization and that opposes covering some or all of the required contraceptive services on religious grounds. 45 C.F.R. 147.131(b). In light of this Court's decision in *Hobby Lobby*, the Departments have also extended the same accommodation to closely held for-profit entities that object to providing contraceptive coverage based on their owners' religious beliefs.

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[3] Under the Act's grandfathering provision, health plans that have not made specified changes since the Act's enactment are exempt from many of the Act's reforms, including the requirement to cover preventive services. *Hobby Lobby*, 134 S. Ct. at 2763-2764; see 42 U.S.C. 18011. The percentage of employees in grandfathered plans is "quickly phasing down," *PFL*, 772 F.3d at 266 n.25, having dropped from 56% in 2011 to 26% in 2014. *Health Benefits Survey* 7, 210.

80 Fed. Reg. 41,324-41,330, 41,346 (July 14, 2015) (to be codified at 45 C.F.R. 147.131(b)(2)(ii)).[4]

a. The accommodation exempts objecting employers from any obligation to provide contraceptive coverage and instead requires third parties to make separate payments for contraceptive services on behalf of employees (and their covered dependents) who choose to use those services. 78 Fed. Reg. at 39,875-39,880.

If the employer invoking the accommodation has an insured plan—that is, if it purchases coverage from a health insurance issuer such as BlueCross BlueShield—then the obligation to provide separate coverage falls on the insurer. The insurer must "exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763; see 45 C.F.R. 147.131(c).

Rather than purchasing coverage from an insurer, some employers "self-insure" by paying employee health claims themselves. Self-insured employers typically hire an insurance company or other outside entity to serve as a third-party administrator (TPA) responsible for processing claims and performing other administrative tasks. 78 Fed. Reg. at 39,879-

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[4] "'[C]hurches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order,'" are exempt from the contraceptive-coverage requirement under a separate regulation that incorporates a longstanding definition from the Internal Revenue Code. *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. 6033(a)(3)(A) and citing 45 C.F.R. 147.131(a)).

39,880 & n.40. If a self-insured employer invokes the accommodation, its TPA "must 'provide or arrange payments for contraceptive services' for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763 n.8 (quoting 78 Fed. Reg. at 39,893); see 29 C.F.R. 2590.715-2713A(b)(2). The TPA may then obtain compensation for providing the required coverage through a reduction in fees paid by insurers to participate in the federally-facilitated insurance Exchanges created under the Affordable Care Act. *Hobby Lobby*, 134 S. Ct. at 2763 n.8.

The accommodation operates differently if a self-insured organization has a "church plan" as defined in 29 U.S.C. 1002(33). Church plans are generally exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* See 29 U.S.C. 1003(b)(2). The government's authority to require a TPA to provide coverage under the accommodation derives from ERISA. See 29 C.F.R. 2510.3-16(b); 80 Fed. Reg. at 41,323. Accordingly, if an eligible organization with a self-insured church plan invokes the accommodation, its TPA is not legally required to provide separate contraceptive coverage to the organization's employees, but the government will reimburse the TPA if it provides coverage voluntarily. 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014).

In all cases, an employer that opts out under the accommodation has no obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. The employer also need not inform plan par-

ticipants of the separate coverage provided by third parties. Instead, insurers and TPAs must provide such notice themselves, must do so "separate from" materials distributed in connection with the employer's group health coverage, and must make clear that the objecting employer plays no role in covering contraceptive services. 29 C.F.R. 2590.715-2713A(d); 45 C.F.R. 147.131(d).[5] The accommodation thus "effectively exempt[s]" objecting employers from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

b. The original accommodation regulations provided that an eligible employer could invoke the accommodation, and thereby opt out of the contraceptive-coverage requirement, by "self-certify[ing]" its eligibility using a form provided by the Department of Labor and transmitting that form to its insurer or TPA. *Hobby Lobby*, 134 S. Ct. at 2782; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(A); 45 C.F.R. 147.131(c)(1)(i). In light of this Court's interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014) (*Wheaton*), the Departments have also made available an alternative procedure for invoking the accommodation.

In *Wheaton*, the Court granted an injunction pending appeal to Wheaton College, which had challenged the accommodation under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et*

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[5] A model notice informs employees that their employer "will not contract, arrange, pay, or refer for contraceptive coverage" and that the issuer or TPA "will provide separate payments for contraceptive services." HHS, *Notice of Availability of Separate Payments for Contraceptive Services*, https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/cms-10459-enrollee-notice.pdf (last visited Sept. 8, 2015).

seq. As a condition for injunctive relief, the Court required Wheaton to inform HHS in writing that it satisfied the requirements for the accommodation. *Wheaton*, 134 S. Ct. at 2807. The Court provided that Wheaton "need not use the form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." *Ibid.* At the same time, the Court specified that "[n]othing in [its] order preclude[d] the Government from relying on" Wheaton's written notice "to facilitate the provision of full contraceptive coverage under the Act" by requiring Wheaton's insurers and TPAs to provide that coverage separately. *Ibid.* The government was able to do so because, as the Court was aware, Wheaton had identified its insurers and TPAs in the course of the litigation. *Id.* at 2815 (Sotomayor, J., dissenting).

In light of this Court's interim order in *Wheaton*, the Departments augmented the accommodation to provide all eligible employers with an option essentially equivalent to the one made available to Wheaton. The regulations allow an eligible employer to opt out by notifying HHS of its objection rather than by sending the self-certification form to its insurer or TPA. 79 Fed. Reg. at 51,092. The employer need not use any particular form and need only indicate the basis on which it qualifies for the accommodation, as well as the type of plan it offers and contact information for the plan's insurers and TPAs. *Id.* at 51,094-51,095; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1)(ii). If an employer opts out using this alternative procedure, HHS and the Department of Labor notify its issuers and TPAs of their obligation to provide separate contraceptive coverage. *Ibid.*

3. Petitioners are three nonprofit religious organizations that provide health coverage for their employees, but that object to covering certain contraceptive services. Pet. App. 9a. East Texas Baptist University has a self-insured plan regulated under ERISA; Houston Baptist University and Westminster Theological Seminary (Westminster) offer coverage through ERISA-exempt church plans. *Ibid.*; Pet. 14-15.[6] Petitioners are eligible to opt out of the contraceptive-coverage requirement under the accommodation. Pet. App. 9a.

4. Petitioners filed this suit challenging the accommodation under RFRA, which provides that the government may not "substantially burden a person's exercise of religion" unless that burden is "the least restrictive means of furthering [a] compelling government interest." 42 U.S.C. 2000bb-1. Petitioners asserted that the accommodation substantially burdens their religious exercise because the government will arrange for their TPAs to provide employees with separate contraceptive coverage if petitioners themselves opt out. The district court agreed, granting summary judgment on petitioners' RFRA claim and then entering a permanent injunction and partial final judgment under Federal Rule of Civil Procedure 54(b). Pet. App. 29a-88a.

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[6] Westminster previously offered coverage through an insured plan, but switched to a self-insured church plan while this suit was pending. Pet. 14-15. Petitioners' challenges to the accommodation concern only their employee plans; they have not sought relief in connection with any health coverage they may arrange for their students. Cf. 45 C.F.R. 147.131(f) (providing that the accommodation is available in connection with student health plans arranged by religious colleges and universities).

5. The court of appeals consolidated this case with other RFRA challenges to the accommodation and reversed, unanimously holding that the accommodation does not substantially burden the exercise of religion. Pet. App. 1a-28a. The court explained that in determining whether a regulation imposes a substantial burden, a court may not question a claimant's characterization of its sincere religious beliefs. *Id.* at 13a. But the court held—in accordance with "all of [the other] circuits that have considered contraceptive-mandate cases"—that a reviewing court must determine, as a matter of law, whether the challenged regulation imposes a substantial burden on the claimant's religious exercise that is cognizable under RFRA. *Ibid.*; see *id.* at 13a-17a.

In this case, the court emphasized that the accommodation allows petitioners to opt out of any obligation to provide, pay for, or facilitate access to contraceptives. Pet. App. 21a-23a. Instead, the accommodation requires or encourages petitioners' TPAs to provide coverage and to do so separately from the coverage provided by petitioners. *Id.* at 22a-23a. The court concluded that petitioners' sincere objections to the actions of those third parties do not constitute a substantial burden on petitioners' exercise of religion cognizable under RFRA: "The acts that violate [petitioners'] faith are the acts of the government, insurers, and [TPAs], but RFRA does not entitle [petitioners] to block third parties from engaging in conduct with which they disagree." *Id.* at 23a.

ARGUMENT

Petitioners contend that RFRA entitles objecting employers not only to opt out of providing contraceptive coverage themselves, but also to prevent the

government from eliminating the resulting harm to their female employees and beneficiaries by arranging for third parties to provide those women with separate coverage. Seven courts of appeals have considered that claim, and all seven have rejected it. As those courts have explained, the accommodation is entirely consistent with RFRA and with this Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which was premised on the availability of the accommodation and which did not suggest that objecting employers may prevent their employees from receiving contraceptive coverage from third parties willing to provide it. The petition should be denied.[7]

1. The accommodation exempts religious objectors from the generally applicable requirement to provide contraceptive coverage, while also seeking to ensure that third parties provide the affected women with the coverage to which they are legally entitled. In our pluralistic society, that sort of substitution of obligations is an appropriate means of accommodating religious objectors while also protecting other important interests, such as women's interest in full and equal health coverage. As the courts of appeals to consider the question have uniformly recognized, such an ac-

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[7] Several other pending petitions present the same question. See *Geneva College* v. *Burwell*, No. 15-191 (filed Aug. 11, 2015); *Southern Nazarene Univ.* v. *Burwell*, No. 15-119 (filed July 24, 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, No. 15-105 (filed July 23, 2015); *Roman Catholic Archbishop of Wash.* v. *Burwell*, No. 14-1505 (filed June 19, 2015); *Priests for Life* v. *HHS*, No. 14-1453 (filed June 9, 2015); *Zubik* v. *Burwell*, No. 14-1418 (filed May 29, 2015).

commodation does not impose a substantial burden on the exercise of religion.

a. To opt out of the contraceptive-coverage requirement under the accommodation, an eligible employer need only take either of two actions: notify HHS that it objects to providing contraceptive coverage and identify its insurers and TPAs, or notify its insurers and TPAs directly using a form provided by the government. Taking either step relieves the employer of any obligation to provide, arrange, or pay for the coverage to which it objects. *Hobby Lobby*, 134 S. Ct. at 2763. The government instead places the responsibility to provide separate coverage on insurers and TPAs—or, if the employer has an ERISA-exempt church plan, the government offers to compensate TPAs if they provide separate coverage voluntarily. 79 Fed. Reg. at 51,095 n.8; see p. 6, *supra*. The accommodation thus "effectively exempt[s]" objecting employers from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

Petitioners do not object to notifying their insurers and TPAs that they have religious objections to providing contraceptive coverage. They have done so in the past and presumably would continue to do so even if they obtained the relief they seek here, in order to ensure that petitioners themselves did not provide contraceptive coverage. See Pet. App. 38a-42a. Petitioners also do not object to notifying the government of their objection and identifying their TPAs—in fact, they have done so in this litigation. *Ibid.* Petitioners' objection thus is not to "the acts *they* are required to perform" in order to invoke the accommodation, but instead to the actions of the government and TPAs, consistent with federal law, that

would occur after petitioners themselves opted out. *Id.* at 18a. As the court of appeals explained, however, "RFRA does not entitle [petitioners] to block third parties from engaging in conduct with which they disagree." *Id.* at 23a.

Every other court of appeals to consider the issue has reached the same conclusion, likewise holding that "religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." *Priests for Life* v. *HHS*, 772 F.3d 229, 246 (D.C. Cir. 2014), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015); accord *Grace Schools* v. *Burwell*, No. 14-1430, 2015 WL 5167841, at *17 (7th Cir. Sept. 4, 2015); *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, No. 13-2723, 2015 WL 4979692, at *12 (6th Cir. Aug. 21, 2015); *Catholic Health Care Sys.* v. *Burwell*, No. 14-427, 2015 WL 4665049, at *14-*16 (2d Cir. Aug. 7, 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, No. 13-1540, 2015 WL 4232096, at *30 (10th Cir. July 14, 2015) (*Little Sisters*), reh'g en banc denied, 2015 WL 5166807 (10th Cir. Sept. 3, 2015), petitions for cert. pending, Nos. 15-105 and 15-119 (filed July 23 and 24, 2015); *Wheaton College* v. *Burwell*, 791 F.3d 792, 799-801 (7th Cir. 2015) (*Wheaton*); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 618-619 (7th Cir. 2015) (*Notre Dame*); *Geneva College* v. *Secretary HHS*, 778 F.3d 422, 439-440 (3d Cir. 2015), petitions for cert. pending, Nos. 14-1418 and 15-191 (filed May 29 and Aug. 11, 2015).

b. Petitioners err in asserting (Pet. 23-32) that those decisions departed from this Court's guidance in *Hobby Lobby* by questioning the objecting employers' religious judgment that the accommodation is inconsistent with their beliefs. *Hobby Lobby* reiterated that it is not the function of the courts to "say that [a RFRA claimant's] religious beliefs are mistaken or insubstantial." 134 S. Ct. at 2779. But that is not what the courts of appeals have done. Like its sister circuits, the court of appeals emphasized that it was not questioning petitioners' religious beliefs about the accommodation. Pet. App. 17a, 24a-25a; see also, *e.g.*, *Catholic Health Care Sys.*, 2015 WL 4665049, at *7, *14; *Little Sisters*, 2015 WL 4232096, at *19; *PFL*, 772 F.3d at 247. Instead, the court held that petitioners' sincere objections do not establish a substantial burden on their religious exercise because, *as a legal matter*, RFRA does not permit religious adherents to "challenge the independent conduct of third parties." Pet. App. 28a.

That conclusion follows from decisions establishing that a religious adherent "may not use a religious objection to dictate the conduct of the government or of third parties." *PFL*, 772 F.3d at 246; see Pet. App. 14a-16a. This Court has made clear, for example, that the free exercise of religion "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986); see *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-452 (1988). For similar reasons, "RFRA does not prevent the government from reassigning obligations after an objector opts out simply because the objector strongly

opposes the ultimate goal of the generally applicable law." *Little Sisters*, 2015 WL 4232096, at *30.

Petitioners may sincerely believe that invoking the accommodation would make them complicit in objectionable conduct by the government and by others, but RFRA does not permit them to collapse the *legal* distinction between requirements that apply to them and the government's arrangements with third parties. See *Roy*, 476 U.S. at 701 n.6 ("Roy's religious views may not accept this distinction between individual and governmental conduct. It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction.") (citation omitted). As Judge Smith explained for the unanimous panel below, petitioners' contrary view would "subject a wide range of federal programs to strict scrutiny," creating an "endless" potential for RFRA claims that Congress could not have intended to authorize. Pet. App. 24a.

It would be particularly inappropriate to hold that the government's dealings with third parties create a substantial burden where, as here, the government is acting to fill a gap left because petitioners themselves have chosen to opt out of a requirement to which they object on religious grounds. In our pluralistic society, it is not unusual to allow religious objectors to claim exemptions from generally applicable requirements while obligating others to fill their shoes. *Little Sisters*, 2015 WL 4232096, at *16; see *id.* at *24 & n.31 (collecting examples of "the diverse array of mechanisms that federal, state, and local governments have used to accommodate objectors"). Under petitioners' view, however, all such accommodations could be recast as substantial burdens on the exercise of reli-

gion and subjected to strict scrutiny. For example, "a religious conscientious objector to a military draft" could claim that being required to claim conscientious-objector status constitutes a substantial burden on his exercise of religion because it would "'trigger' the draft of a fellow selective service registrant in his place and thereby implicate the objector in facilitating war." *PFL*, 772 F.3d at 246 (citation omitted); see *Geneva College*, 778 F.3d at 439 n.14 (providing a similar example of a religious adherent who objects to requesting time off on the Sabbath because his employer will require someone else to work in his place).

That sweeping understanding of RFRA is inconsistent with our Nation's traditions and finds no support in this Court's precedents. "When the government establishes a scheme that anticipates religious concerns by allowing objectors to opt out but ensuring that others will take up their responsibilities, [the objectors] are not substantially burdened merely because their decision to opt out cannot prevent the responsibility from being met." *Little Sisters*, 2015 WL 4232096, at *26.

c. Petitioners' RFRA claims do not depend on the details of the accommodation. Instead, they appear to object to *any* system in which the government requires them to take action to opt out of the contraceptive-coverage requirement and responds to that opt-out by ensuring that the affected women receive separate contraceptive coverage from others —no matter how the government identifies or structures its arrangements with those third parties. Cf. Pet. 1-2, 32. But although petitioners make clear (Pet. 32) that disputes about the particular workings of the accommodation at issue here are "beside the point,"

they also mischaracterize the accommodation in numerous respects.

For example, petitioners assert (Pet. 12) that an objecting organization's self-certification or notice to HHS "triggers and authorizes provision of [contraceptive] coverage." In fact, as the courts of appeals have emphasized, "*[f]ederal law*, rather than any involvement by [petitioners] in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and [TPAs] to provide coverage for contraceptive services." *Geneva College*, 778 F.3d at 437; see, *e.g.*, *Little Sisters*, 2015 WL 4232096, at *22 (same). Petitioners need only register their objection and claim an opt-out; *the government* then requires insurers and TPAs to take their place.

Relatedly, petitioners state (Pet. 11-12, 31-32) that the augmented accommodation procedure requires self-insured employers to execute an instrument that has the legal effect of designating their TPAs as the entities responsible for providing contraceptive coverage. That is incorrect. Under the original version of the accommodation, an objecting organization opted out by completing a form provided by the Department of Labor and sending the form to its insurer or TPA. 29 C.F.R. 2590.715-2713A(a)(1) (2014). The form, known as EBSA Form 700, required the objecting organization only to certify its eligibility for the accommodation; the reverse side then referred a TPA receiving the form to the regulations setting forth its obligations. See *Wheaton College* v. *Burwell*, 134 S. Ct. 2806, 2816 (2014) (appendix to the dissenting opinion of Sotomayor, J.). For self-insured employers, the form was treated as an "instrument under which the plan is operated" that, among other things, had the

legal effect of designating the TPA as the plan "administrator" responsible for providing contraceptive coverage under ERISA. 29 C.F.R. 2510.3-16(b) (2014); see 29 U.S.C. 1002(16)(A) (defining a plan "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated").[8]

Under the augmented accommodation regulations issued in August 2014, an objecting employer can opt out by providing notice to HHS rather than sending EBSA Form 700 to its TPA. 29 C.F.R. 2590.715-2713A(b)(ii). If an employer opts out using that alternative procedure, its notice to HHS is a plan instrument that invokes the opt-out and excuses the employer from the obligation to provide contraceptive coverage. *Ibid.* DOL then sends a *separate* notification to the TPA, and the regulations provide that "[s]uch notification from [DOL] shall be an instrument under which the plan is operated" and shall serve to designate the TPA as the plan administrator responsible for providing contraceptive coverage. 29 C.F.R. 2510.3-16(b); see 80 Fed. Reg. at 41,323.

Petitioners also err in asserting (*e.g.*, Pet. 30) that under the accommodation, contraceptive coverage is provided "via the religious employers' own plans." If an objecting employer has an insured plan, the regulations provide that the insurer must "*[e]xpressly ex-*

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[8] Although Section 1002(16)(A) refers to a singular plan "instrument," ERISA plans can be—and typically are—operated under multiple "instruments." See *Pettaway* v. *Teachers Ins. & Annuity Ass'n of Am.*, 644 F.3d 427, 433-434 (D.C. Cir. 2011). The term "encompasses [the] formal or legal documents under which a plan is set up or managed." *Faircloth* v. *Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir. 1996), cert. denied, 519 U.S. 1077 (1997).

clude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and must instead "[p]rovide separate payments" for contraceptive services. 45 C.F.R. 147.131(c)(2)(i) (emphases added). Similarly, if the employer has an ERISA-exempt self-insured church plan—as Houston Baptist and Westminster do—then its TPA does not become the plan administrator by operation of 29 C.F.R. 2510.3-16(b), and any contraceptive coverage voluntarily provided by the TPA therefore has no connection to the employer's plan. If the objecting employer has a self-insured plan, the contraceptive coverage provided by its TPA is, as an ERISA matter, part of the same ERISA plan as the coverage provided by the employer. See 78 Fed. Reg. at 39,879-39,880. But the employer neither funds nor controls that separate coverage—instead, the TPA does so. 29 C.F.R. 2510.3-16(b) and (c); see 78 Fed. Reg. at 39,879-39,880; *Wheaton*, 791 F.3d at 800. And the TPA must make clear to employees that the employer plays no role in the provision of the coverage to which it objects. 29 C.F.R. 2590.715-2713A(d); see n.5, *supra*.

Petitioners do not explain how the ERISA status of separate contraceptive coverage provided by their TPAs would burden their religious exercise. And in any event, neither that nor any other feature of the accommodation specific to self-insured employers could constitute a substantial burden under RFRA: If petitioners object to those aspects of the accommodation, they "could avoid the situation they deem objectionable by employing an insured plan." *Little Sisters*, 2015 WL 4232096, at *24 n.32.

Finally, petitioners repeatedly emphasize (Pet. 12) that an employer that invokes the accommodation is "deemed to comply" with the contraceptive-coverage requirement. See, *e.g.*, Pet. i, 2, 7, 20, 23, 24, 30-31. But petitioners do not—and could not—suggest that being deemed to comply with an objectionable requirement imposes a substantial burden on a religious objector excused from *actual* compliance. And, as demonstrated above, the accommodation ensures that objecting employers play no role in the actual provision of contraceptive coverage.

2. Even if petitioners could establish a substantial burden on their exercise of religion, the accommodation would satisfy RFRA scrutiny because, as the D.C. Circuit held, "the regulatory opt-out mechanism is the least restrictive means to serve compelling governmental interests." *PFL*, 772 F.3d at 237; see *id.* 256-267; *Notre Dame*, 786 F.3d at 616-618.

a. The accommodation furthers "the government's compelling interest in providing women full and equal benefits of preventive health coverage," *PFL*, 772 F.3d at 264, and in filling the gaps in the Affordable Care Act's comprehensive regulatory scheme created when religious objectors opt out. Although this Court was not required to decide the issue in *Hobby Lobby*, see 134 S. Ct. at 2780, five Justices recognized that the contraceptive-coverage requirement "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785-2786 (Kennedy, J., concurring); accord *id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting).

As Judge Kavanaugh has explained, "[i]t is not difficult to comprehend why a majority of the Justices" reached that conclusion. *Priests for Life* v. *HHS*, No. 13-5368, 2015 U.S. App. LEXIS 8326, at *65-*66 (D.C. Cir. May 20, 2015) (*PFL II*) (Kavanaugh, J., dissenting from the denial of rehearing en banc). Contraceptive coverage "enables women to avoid the health problems unintended pregnancies may visit on them and their children"—problems that are particularly acute for women with medical conditions that render pregnancy "hazardous, even life threatening." *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting). "About 50% of all pregnancies in the United States are unintended." *PFL II*, 2015 U.S. App. LEXIS 8326, at *66 (Kavanaugh, J., dissenting from the denial of rehearing en banc). Reducing unintended pregnancies by making it easier for women to obtain the most effective and appropriate forms of contraception for them would not only "further women's health," but also "advance women's personal and professional opportunities, reduce the number of abortions, and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age." *Ibid.*; see *PFL*, 772 F.3d at 257-264; *Notre Dame*, 786 F.3d at 608; *IOM Report* 102-109.

b. The accommodation is the least restrictive means of furthering the compelling interests at stake. The Departments engaged in an extensive rulemaking process that included multiple rounds of public comment and consultation with "representatives of religious organizations, insurers, women's groups, insurance experts, and other interested stakeholders." 77 Fed. Reg. at 16,503. They considered a wide variety

of alternative approaches, but concluded that those alternatives "were not feasible and/or would not advance the government's compelling interests as effectively" as the accommodation. 78 Fed. Reg. at 39,888.

Petitioners assert (Pet. 33-34) that the government could instead provide contraceptive coverage to their employees through other means, such as by offering free contraceptive coverage on the Affordable Care Act's health insurance Exchanges. But petitioners have not stated that those alternatives would resolve their religious objections to the accommodation, which would appear to apply to *any* system in which their employees gain an entitlement to contraceptive coverage from third parties after petitioners opt out—including a system in which the result of petitioners invoking an opt-out was that their employees became eligible for coverage through the Exchanges.

Unlike *Hobby Lobby*, moreover, this is not a case in which a proposed less-restrictive alternative is "an existing, recognized, workable, and already-implemented framework to provide coverage." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). This Court explained that accepting the RFRA challenge in *Hobby Lobby* "need not result in any detrimental effect on any third party" because the accommodation already in place for religious nonprofit organizations could be extended to closely held for-profit companies. *Id.* at 2781 n.37. The Court thus repeatedly emphasized that the effect of its decision on female employees and beneficiaries "would be precisely zero." *Id.* at 2760; see *id.* at 2759, 2782-2783. Here, in contrast, petitioners seek to invalidate the very regulatory accommodation that *Hobby Lobby* identified. And all of the alternatives that have been

suggested would require Congress to establish "a whole new program" of contraceptive coverage, *id.* at 2786 (Kennedy, J., concurring), or to significantly modify an existing program. Unless Congress took such action, women who rely on objecting employers for their health coverage would be denied coverage.

In addition, even if petitioners' proposed alternatives to the accommodation were ultimately enacted by Congress, those alternatives would not "equally further[] the Government's interest," *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring), or "protect the asserted needs of women as effectively" as the accommodation, *id.* at 2782 (majority opinion). At a minimum, the alternatives would require women to "take steps to learn about, and to sign up for, a new government funded and administered health benefit." *Id.* at 2783 (citation omitted). They would also require women to "identify different providers or reimbursement sources" or to "pay out of pocket and wait for reimbursement." *PFL*, 772 F.3d at 265; accord *Notre Dame*, 786 F.3d at 616-617.

Those burdens would constitute a substantial barrier to full and equal health coverage for women. The point of requiring coverage of preventive services without cost-sharing is that even small burdens impair access to those services. The Departments explained that "[r]esearch * * * shows that cost sharing can be a significant barrier to effective contraception," 77 Fed. Reg. at 8728, and that "[i]mposing additional barriers to women receiving the intended coverage * * * by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women," 78 Fed. Reg. at 39,888; see *id.* at 39,873; *IOM Report* 18-20,

109. Those barriers would also deny women *equal* access to health coverage that is appropriate to their needs—a central purpose of the Act's specific provision for women's preventive services. *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring); *PFL*, 772 F.3d at 235. Accordingly, as the D.C. Circuit explained, "[p]roviding contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government's interest." *PFL*, 772 F.3d at 265.

The accommodation serves that interest while allowing objecting employers to opt out of any role in affording the coverage. In contending that even more is required, and that RFRA grants them a right to prevent the affected women from obtaining separate coverage from third parties, petitioners disregard this Court's admonition that courts applying RFRA "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)). The free exercise of religion protected by RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2787 (Kennedy, J., concurring).

3. Petitioners note (Pet. 3, 21) that this Court has granted interim relief to parties challenging the accommodation, most recently in *Wheaton* and *Zubik* v. *Burwell*, 135 S. Ct. 2924 (2015). Although the Court cautioned that those interim orders should not be construed as an expression of its views of the merits,

the orders further confirm that the accommodation is consistent with RFRA.

Nothing in this Court's interim orders in *Wheaton* and *Zubik* suggested that RFRA grants objecting employers a right to prevent employees from receiving contraceptive coverage from third parties. To the contrary, the Court expressly stated that its orders did not "preclude the Government from relying on information provided by the [employers], to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." *Zubik*, 135 S. Ct. at 2924; see *Wheaton*, 134 S. Ct. at 2807. The Court therefore emphasized that its orders would not "affect[] the ability of * * * employees to obtain, without cost, the full range of FDA approved contraceptives." *Ibid.*

In light of the *Wheaton* order, moreover, the Departments augmented the accommodation to provide all eligible employers with an option essentially equivalent to the one this Court's interim orders provided to the challengers in *Wheaton* and *Zubik*. Like those organizations, any eligible employer (including a closely held for-profit company) may now opt out of the contraceptive-coverage requirement by informing HHS that it objects to providing contraceptive coverage and is eligible for the accommodation. 29 C.F.R. 2590.715-2713A(b)(1)(ii) and (c)(1); 45 C.F.R. 147.131(c)(1)(ii). And as under this Court's interim orders, the employer need not use a particular form to notify the government of its objection, and it need not send a form to its insurers and TPAs. *Ibid.*

In dissenting from the denial of rehearing en banc in *PFL*, Judge Kavanaugh suggested that the augmented accommodation is not the least restrictive

means of serving the government's compelling interests because it requires an objecting employer to identify its insurers and TPAs—information that this Court did not require in *Wheaton* and *Zubik*, or in a similar interim order issued prior to *Hobby Lobby* in *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 1022 (2014). See *PFL II*, 2015 U.S. App. LEXIS 8326, at *67-*75. Judge Kavanaugh inferred from this Court's interim orders that "the Government can independently determine the identity of the [objecting] organizations' insurers [and TPAs]." *Id.* at *70. Therefore, although he emphasized that "[t]he Government may of course continue to require the religious organizations' *insurers* [*and TPAs*] to provide contraceptive coverage to the religious organizations' employees," he would have required the government to allow objecting employers to invoke the accommodation without identifying those third parties. *Id.* at *75-*76.

Petitioners do not adopt Judge Kavanaugh's position, presumably because it would not address their religious objections to a system in which, after petitioners themselves opt out, their employees receive contraceptive coverage from petitioners' TPAs. In any event, Judge Kavanaugh's dissent rested on a mistaken premise. He appeared to assume that the interim orders in *Wheaton* and *Zubik* did not require the challengers to identify their insurers and TPAs because the government is able to determine that information "independently." *PFL II*, 2015 U.S. App. LEXIS 8326, at *70. But as this Court was aware, the government knew the identities of the relevant insurers and TPAs in *Wheaton* and *Zubik* because the challengers themselves had already provided that

information in the course of the litigation. *Wheaton*, 134 S. Ct. at 2815 (Sotomayor, J., dissenting); Mem. for Resps. in Opp. at 31 & n.17, *Zubik*, *supra* (No. 14A1065). The government does not have records of employers' insurers and TPAs as a general matter, and neither the Departments nor public commenters have identified "any alternative means the Departments c[ould] use to obtain the required information" if it were not provided by objecting employers. 80 Fed. Reg. at 41,323.

The information required by the alternative notice procedure thus "represents the minimum information necessary" for the Departments to administer the accommodation. 80 Fed. Reg. at 41,323. That information is neither religious in nature nor confidential. RFRA does not confer a right on a religious employer to withhold that limited factual information from the Departments responsible for implementing the Affordable Care Act. Furnishing such information is, rather, the kind of routine administrative task that may be required of a religious objector "in the administration of governmental programs." *Little Sisters*, 2015 WL 4232096, at *30.

4. The court of appeals correctly rejected petitioners' RFRA challenge to the accommodation. Its decision was entirely consistent with this Court's decision in *Hobby Lobby* and with the Court's interim orders in *Wheaton* and *Zubik*. All six other circuits that have decided the issue agree. This Court's review of the question presented is therefore unwarranted. But even if that question otherwise warranted certiorari, this case would not be an appropriate vehicle in which to consider it for several reasons.

First, as of the date of this filing, the decision below remains subject to a petition for rehearing en banc filed by other parties to the consolidated cases before the court of appeals. 14-10241 Docket entry (Aug. 3, 2015). It would be unusual for this Court to grant a petition for a writ of certiorari to review a decision that is still under consideration in the court below.

Second, this case does not present the full range of coverage arrangements that have given rise to RFRA challenges to the accommodation. The accommodation operates somewhat differently with respect to insured plans, self-insured plans subject to ERISA, and ERISA-exempt self-insured church plans. See pp. 5-6, 18-19, *supra*. Some judges have concluded that those differences are material to the RFRA analysis. See, *e.g.*, *Little Sisters*, 2015 WL 4232096, at *41 (Baldock, J., dissenting in part); *Roman Catholic Archbishop of Washington* v. *Sebelius*, 19 F. Supp. 3d 48, 72-85 (D.D.C. 2013). Because petitioners all have self-insured plans, this case does not present the validity of the accommodation as applied to insured plans.

Third, the decision below addresses only the question whether the accommodation imposes a substantial burden on the exercise of religion; it does not consider whether the accommodation qualifies as the least restrictive means of furthering a compelling government interest. That would make this case a less suitable vehicle than one in which all of the potentially dispositive issues were addressed by the decision below. See *Cutter*, 544 U.S. at 718 n.7 (this Court "is a court of review, not of first view"); cf. Br. in Opp. at 30-31, *Priests for Life* v. *HHS* and *Roman Catholic*

Archbishop of Washington v. *Burwell*, Nos. 14-1453 & 14-1505 (Aug. 12, 2015).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 15-35

In the Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS

v.

SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

Notwithstanding HHS's obstinate efforts to contend otherwise, this case is not about whether religious nonprofits have a right to prevent their employees from receiving cost-free contraceptive coverage from third parties. Petitioners assert no such right, and they would not object to HHS making such arrangements with third parties, if only HHS did not force petitioners themselves to take actions that HHS deems necessary to achieve its ends and put petitioners into compliance with its contraceptive mandate. How HHS can simultaneously claim that the affirmative actions it compels from petitioners are essential to accomplishing its compelling interest in providing cost-free contraception and yet insufficient to make petitioners complicit in providing that coverage is mystifying. But ultimately neither HHS nor Article III courts are the proper arbiters of how much complicity is too much. That is a decision that rests with the religious adherent, as an entire line of this Court's cases makes clear.

HHS emphasizes the unanimity of the circuits in finding no substantial burden, but that ignores the numerous judges, including Judge Rosenthal below and no fewer than five judges on the Tenth Circuit, who have reached contrary judgments. Indeed, the Tenth Circuit judges in the *Little Sisters* case not only rejected the panel majority's reasoning, but confidently predicted that the decision would not long survive. That confidence stems from the clarity with which this Court's precedents speak to the question presented. The contraceptive mandate here is the exact same mandate this Court found to substantially burden religious exercise in *Burwell* v. *Hobby Lobby Stores, Inc.*,

134 S. Ct. 2751 (2014). And despite HHS's rhetoric about "opt-outs," petitioners are no more exempted from or allowed to opt out of that mandate than Hobby Lobby was. They are simply given another option to take affirmative steps that HHS deems necessary to accomplish its desired ends and sufficient for petitioners to satisfy its mandate. Whether that alternative means of compliance makes all the difference is the question that the Courts of Appeals have elided by mistakenly dissecting petitioners' religious beliefs and concluding that there is no substantial burden.

Finally, despite HHS's contrary suggestion, this case is an ideal vehicle for considering these surpassingly important issues. While the Fifth Circuit reached only the substantial burden issue, the District Court reached and rejected HHS's arguments on every relevant issue in entering a permanent injunction against HHS. The record and arguments on appeal thus were fully developed on every issue, and there is no obstacle to HHS raising alternative grounds to defend the Fifth Circuit's mistaken judgment. Likewise, the question presented is broadly framed to enable this Court to resolve all of the issues or to remand for the Court of Appeals to grapple meaningfully with the compelling interest/least restrictive means analysis. But in the end, what matters is not which petition(s) this Court grants, but that the Court intervene now to vindicate Congress's judgment in RFRA before religious organizations are forced to comply with HHS's mandate.

I. The exceptionally important question presented warrants this Court's review.

HHS does not dispute the exceptional importance of the question presented. Nor can it, as thousands of religious nonprofits nationwide are being forced to choose between taking actions that they sincerely believe violate their religious beliefs and paying draconian fines. And for many employers, this Court is now the end of the road. Unless the Court agrees to review the legality of HHS's novel regulatory mechanism for compliance with its contraceptive mandate, they will face the precise dilemma RFRA seeks to eliminate: choosing between violating their religious beliefs and violating the law. As this Court has recognized three times in granting extraordinary relief to employers facing that impossible choice, the stakes are simply too high to allow HHS to force religious organizations to yield before this Court addresses the grave doubts concerning the validity of HHS's insistence.

HHS's emphasis on the concurrence among the circuits ignores both what is at stake and the many impassioned dissents and District Court decisions rejecting HHS's arguments, see Pet.26-27—not to mention the scores of amici supporting this petition and other pending petitions. Five Tenth Circuit judges have joined that chorus since the petition: "All the plaintiffs in this case sincerely believe that they will be violating God's law if they execute the documents required by the government. And the penalty for refusal to execute the documents may be in the millions of dollars. How can it be any clearer that the law substantially burdens the plaintiffs' free exercise of religion?" *Little Sisters of the Poor Home for the Aged* v. *Burwell*, 2015 WL

5166807, at *1 (10th Cir. Sept. 3, 2015) (Hartz, J., dissenting from denial of rehearing en banc).

Rather than answer that question, HHS attempts to obscure the true nature of its regulatory scheme and petitioners' RFRA claims, likening petitioners to an impossible-to-please conscientious objector who objects even to "opting out" of the draft because another registrant will take his place. Resp.Br.16. But the whole problem here—and the real source of petitioners' religious objections—is that HHS has *not* allowed petitioners to "opt out." Instead, HHS has reserved a true opt-out—something RFRA guarantees equally to all adherents—to houses of worship, their associations, and their integrated auxiliaries. What HHS offers petitioners instead is not an exemption, or even an opportunity for exemption, but only an alternative means of *compliance*—an alternative under which, by HHS's own telling, petitioners "need" to and "are required to" perform certain actions to help HHS use their plans to provide the objected-to coverage. Resp.Br.12. HHS will deem petitioners in compliance only if they affirmatively facilitate HHS's efforts to identify and obligate (or in some cases incentivize) closely related third parties to ensure that the petitioners' "health plan[s]" "provide coverage" for all FDA-approved contraceptives. 42 U.S.C. 300gg-13(a).

Thus, the proper analogy is not to a conscientious objector truly allowed to opt out of the draft, but to a conscientious objector given two options to comply with a compulsory service obligation: either serve directly or provide the name and whereabouts of a family member or friend to serve in his stead. No one could

seriously characterize that as an "opt-out" or exemption that relieves the substantial burden on his religious exercise.

Indeed, if all HHS wanted was notice that petitioners want to "opt out", this lawsuit would have been unnecessary, as petitioners have no objection to notifying HHS of their intent to take advantage of a true exemption. The problem is that HHS wants something else entirely: It wants petitioners to *comply* with the mandate by handing over to HHS the information, authority, and plan infrastructure it needs to provide the coverage. As HHS itself admits, requiring "objecting employers" to "furnish[] such information" is "necessary" to its efforts to get contraceptive coverage to their employees. Resp.Br.27. And as HHS now concedes—for the first time—"the contraceptive coverage provided by [the] TPA" of a self-insured plan "is * * * part of the same ERISA plan as the coverage provided by the employer." Resp.Br.19. HHS can hardly claim that "the objecting employer plays no role" in facilitating coverage, Resp.Br.20, when HHS itself claims that the employer's forced execution of the requisite form is essential to getting the coverage to flow—and flow as "part of the" employer's own plan. Resp.Br.19.

Nor can HHS deprive petitioners of their RFRA claims by insisting that what petitioners *really* find morally objectionable is "the actions of the government and TPAs * * * that would occur after petitioners" execute the requisite forms. Resp.Br.12-13. There is nothing unusual about a religious objection that stems from the consequences of compelled acts rather than the acts alone. The religious adherent in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), did not object to

fabricating turrets because he found fabricating turrets morally objectionable. He objected because the turrets would be used to construct tanks that third parties would use to engage in warfare. *Id.* at 710. That his religious objection to his own action of making turrets was related to "the actions of [third parties]," Resp.Br.12-13, did not deprive him of the right to object to what he himself was compelled to do.

The situation is no different here. To be sure, petitioners object to complying via the so-called "accommodation" because doing so forces petitioners to facilitate the provision of contraceptive coverage by third parties. If HHS required them to take similar actions with different consequences, they might not object. Executing a form can have very different legal and moral consequences depending on what it authorizes or enables others to do. But although consequences matter, the object of petitioners' RFRA claims remains the actions HHS would compel *them* to take, not the distinct actions of third parties. That makes HHS's reliance on *Bowen* v. *Roy*, 476 U.S. 693 (1986), entirely misplaced. HHS emphasizes *Bowen*'s holding that the religious adherent could not challenge *the government*'s use of a social security number, Resp.Br.15, but it ignores *Bowen*'s holding that he *could* challenge the requirement to furnish that number himself. See 476 U.S. at 701-02 & n.7. That is because the Court recognized the commonsense difference between objecting to the actions of third parties and objecting to an obligation imposed on the religious adherent himself. In treating petitioners' objections to the obligation HHS has imposed on *them* as no different from an objection

to the actions of third parties, it is HHS that impermissibly seeks "to collapse the *legal* distinction between" the two. Resp.Br.15.

Nonetheless, HHS has convinced several courts to do just that. Worse still, it has convinced courts to "address[] a * * * question that the federal courts have no business addressing"—namely, whether "the connection between what the objecting parties must do * * * and the end that they find to be morally wrong" is close enough to violate their religious beliefs. *Hobby Lobby*, 134 S. Ct. at 2777-2778. The Fifth Circuit did not dispute that petitioners are being compelled to do more than merely inform HHS of their objections; it just deemed what HHS demands something less than "facilitating access to contraceptives," Pet.App.18a, notwithstanding petitioners' sincere religious beliefs to the contrary. And the Fifth Circuit is hardly alone in reasoning that employers are simply wrong to believe that the regulatory mechanism "forces [them] to act in a way that would violate [their] beliefs." *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 612 (7th Cir. 2015); see also *Geneva College* v. *Secretary U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) ("objectively assess[ing] whether the appellees' compliance with the self-certification procedure does, in fact * * * make them complicit" in facilitating contraceptive coverage).

HHS understandably attempts to distance itself from the actual reasoning of the decisions it has procured, see Resp.Br.14, but that reasoning confirms that second-guessing sincerely held religious beliefs is the inevitable result of HHS's arguments. As this Court has admonished repeatedly, however, "it is not within the judicial function and judicial competence to

inquire whether" a religious adherent has "correctly perceived the commands of [his] faith." *Thomas*, 450 U.S. at 716. Instead, the only question under the substantial burden analysis is whether the government has "demand[ed] that [religious adherents] engage in conduct that seriously violates their religious beliefs" on pain of "substantial economic consequences." *Hobby Lobby*, 134 S. Ct. at 2775, 2776. Just as in *Hobby Lobby*, the answer here is plainly yes. Indeed, it could hardly be otherwise, as both the mandate and the penalties are the same as those in *Hobby Lobby*. That courts have repeatedly refused to recognize as much is proof enough of the pressing need for this Court's intervention.

II. The decision below is as wrong in its ultimate conclusion as in its substantial burden analysis.

This Court's review also is essential because, under a correct application of RFRA, HHS's decision to offer religious nonprofits an alternative to comply does not solve the RFRA problem this Court identified with the contraceptive mandate in *Hobby Lobby*. First, HHS cannot identify a compelling interest in forcing religious nonprofits to comply with the contraceptive mandate. As this Court explained in *Hobby Lobby*, what matters under RFRA is whether HHS's "marginal interest in enforcing the contraceptive mandate" against *religious adherents* is compelling. *Hobby Lobby*, 134 S. Ct. at 2779. HHS can hardly satisfy that demanding standard when it continues to exempt from *any* form of compliance grandfathered plans covering *more than 25%* of employees. Resp.Br.4 n.3. An interest is hardly compelling when it is excused for a quarter of all employees for reasons of administrative

convenience. Failing to honor a religious objection to a requirement that is so commonly waived for secular reasons is a paradigmatic RFRA violation. And it is all the more problematic when HHS is trying to force *some* religious employers to comply with the mandate while automatically exempting others, even though the religious objections are the same.

Nor is the regulatory mechanism the least restrictive means of providing employees of religious nonprofits with cost-free access to contraceptives. HHS has ample means to achieve that end without forcing the subset of disfavored religious nonprofits to facilitate the provision of coverage by their own insurers or TPAs. Pet.33-34. HHS misleadingly suggests that petitioners would object to "*any* system in which their employees gain an entitlement to contraceptive coverage." Resp.Br.22. But HHS's felt need to continue attacking that straw man is explained only by the weakness of its least restrictive means argument. Petitioners have made it crystal clear that they object only to being compelled to *facilitate* the provision of contraceptive coverage to their employees. If HHS wants to provide those benefits itself or through any process that omits petitioners and their plans, it is free to do so.

HHS complains that those options might require it to expend resources. Resp.Br.22. But as this Court already has admonished, "HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law." *Hobby Lobby*, 134 S. Ct. at 2781. HHS alternatively complains that some options may require congressional approval. Resp.Br.23. But

the least restrictive means analysis has never been understood to be limited to those alternatives already authorized by rule or statute. See, *e.g.*, *Holt* v. *Hobbs*, 135 S. Ct. 853, 864 (2015). In all events, HHS is poorly positioned to complain about the need for congressional action when neither the contraceptive mandate nor the exemption for a fortunate few religious organizations was the result of congressional action. Congress never authorized HHS to design an *ad hoc* exemption for some religious organizations but not others; to the contrary, RFRA demands that *all* religious adherents enjoy its protections.

III. This is an ideal vehicle for resolving the question presented.

This is an ideal vehicle for resolving the question presented. The relevant facts are undisputed, and the courts below fully and finally resolved petitioners' RFRA claims. HHS notes that an en banc petition filed by other parties to the decision below remains pending. Resp.Br.28. But those parties' appeals arose from different District Court decisions, and the en banc petition is in any case irrelevant to the question of which petition(s) to grant, as the Fifth Circuit likely will stay its hand upon a grant of certiorari in this case or another.

HHS notes that petitioners have only two of the three types of plans (self-insured and church plans) considered by courts. Resp.Br.28. But neither HHS nor petitioners contend that the validity of the regulatory option turns on the details of an employer's plan. And understandably so, as the obligation HHS imposes on employers remains the same no matter the plan. In each instance, HHS deems an employer in

compliance only if it executes one of the forms allowing use of the employer's plan infrastructure. In each instance, HHS asserts the same interest in requiring the employer to execute that form. And in each instance, HHS has available all the same alternative means of ensuring provision of cost-free contraceptive coverage without demanding employer involvement. Thus, both HHS's excursion into the details of different plans and its observation that this petition features two of the three plan types are beside the point.

Yet should the Court prefer to consider all three plan types, it can grant this petition in combination with one involving an insured plan, or grant both petitions pending out of a decision that addresses all three plan types, such as the two petitions out of the *Little Sisters* decision. See *Little Sisters of the Poor Home for the Aged* v. *Burwell*, No. 15-105 (filed July 23, 2015); *Southern Nazarene Univ.* v. *Burwell*, No. 15-119 (filed July 27, 2015).*

Finally, that the Fifth Circuit did not reach the compelling interest or least restrictive means analysis is no obstacle to review. The District Court reached those issues in entering a permanent injunction against HHS, so they were fully developed and briefed in both courts below. (Indeed, the issues were more fully developed than in the D.C. Circuit cases, where most plaintiffs lost in District Court and those issues were addressed principally in supplemental briefing

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* The *Little Sisters* petition is also the only one that squarely presents another important and closely related question—namely, whether HHS may pick and choose which religious organizations warrant exemption from its mandate.

on appeal.) And HHS remains free to defend the judgment on those alternative grounds. Thus, this petition and its broadly framed question presented give the Court the option of definitively resolving the mandate issue or correcting the mistaken substantial burden analysis and remanding. But the most important thing is not which petition(s) the Court grants, but that the Court grants review of the exceptionally important question presented now, before it is too late to save religious nonprofits from the impossible choice that HHS has unnecessarily thrust upon them.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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SEPTEMBER 2015

No. 15-35

IN THE

Supreme Court of the United States

EAST TEXAS BAPTIST UNIVERSITY, ET AL.,
Petitioners,

v.

SYLVIA MATTHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC., ET AL., IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC., ET AL., IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Retirement Community; the Alliance Community for Retirement Living, Inc.; the Alliance Home of Carlisle, Pennsylvania d/b/a Chapel Pointe at Carlisle; Town and Country Manor of the Christian and Missionary Alliance; Simpson University; and Crown College as amici curiae in support of petitioners.[1]

INTEREST OF AMICI CURIAE

Amici are four religious, non-profit retirement communities and two religious, non-profit colleges associated with the Christian and Missionary Alliance ("CMA") denomination. All amici follow the doctrines and teachings of the CMA. This includes the belief that all life is equally sacred and blessed of God and must be preserved and nurtured. Because of their belief in the sacredness of all human life, the amici's sincere religious convictions preclude them from providing for, facilitating, authorizing, or designating, directly or indirectly, the provision of

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Both petitioners and respondents were notified of the amici's intention to file this brief at least 10 days prior to the date it was due in accordance with Supreme Court Rule 37.2(a). A letter from the petitioners consenting to all amici briefs is on file with the Clerk's office, and a letter from the Office of the Solicitor General consenting to the filing of this brief is submitted herewith.

drugs, devices, procedures, or counseling that could harm or kill a fertilized egg. Amici thus have a strong interest in preserving their right under the Religious Freedom Restoration Act of 1993 to choose to offer health insurance coverage that comports with their sincere religious beliefs.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

> *Now, what ... kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined?*
> — *Justice Kennedy during oral argument in* Burwell v. Hobby Lobby Stores[2]

Religious liberty in our constitutional tradition means that "all persons have the right to believe or strive to believe in a divine creator and a divine law." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). But it also means much more. It allows individuals to "preserv[e] their own dignity and ... striv[e] for a self-definition shaped by their religious precepts." *Id.* And it protects the individual's "right to express [her] beliefs and to establish [her] religious (or non-religious) self-definition in the political, civic, and economic life of our larger community." *Id.*

A believer's ability to act in accordance with his religious beliefs is inestimably important. In reli-

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[2] Transcript of Oral Argument at 56, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

gion, as in all aspects of life, actions often speak louder than words. Recognizing that different people may assign different significance to different acts, the government and the courts have studiously avoided judging the importance or reasonableness of the actions that an individual believes will bear on his eternal fate.

Reiterating and reinforcing this tradition, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). In RFRA, Congress made a clear policy determination about the importance of religious liberty—including the right to act in accordance with one's faith. Congress declared that, as a default rule, religious beliefs must be respected, even if that means religious believers have to be exempted from otherwise generally applicable laws. It made this default rule applicable across the U.S. Code, including to subsequent enactments like the Affordable Care Act ("ACA"). And Congress afforded protection to all religious believers without drawing presumptive distinctions between them.

Despite this, when implementing the "preventative care" provision of the ACA, HHS decided that only *some* religious believers were entitled to the full protections that RFRA provides. Knowing that several religious entities—both churches and other religious organizations—objected to having any involvement in providing certain contraceptives, HHS nonetheless determined that it needed to completely exempt only churches from the contraceptive mandate. In HHS's view, non-churches who shared *identical* religious beliefs did not deserve the same protection. Instead, they merited only an accommodation which required them to authorize another entity

to use their health plans to provide contraceptive coverage in their stead—an action that the religious objectors consider morally tantamount to providing the abortifacient contraceptives themselves.

In drawing arbitrary distinctions between classes of religious believers, HHS contradicted an express statutory protection, exceeded its delegated authority, and substantially burdened the sincere religious beliefs of several objectors, including the petitioners in this case. HHS has given the non-church religious objectors two choices: violate their sincere religious beliefs or pay a hefty fine. This Court already found that this choice violates RFRA, and it should not hesitate to do so again.

REASONS FOR GRANTING THE PETITION

A. This Case Is Exceptionally Important Because HHS's Bifurcated Exemption-Accommodation Scheme Directly Contradicts Congress's Command for Universal Protection of Religious Liberty in RFRA

An important separation-of-powers issue permeates petitioners' and other religious organizations' objections to HHS's decision to require contraceptives as a form of "preventative care" under the ACA. Knowing full well that several religious employers objected to providing some or all of the contraceptives it had required, HHS nonetheless exempted churches—and *only* churches—from its contraceptive mandate. It required all other religious organizations to either be complicit in fulfilling the regulatory mandate or drop their insurance plans and pay substantial fines. By offering some religious objec-

tors greater protection than others, HHS improperly took upon itself the status of super-legislature, deciding just how far the government should go in protecting religious liberty. But neither the Constitution, nor Congress, gave HHS that power over this important question. In RFRA, Congress in fact *obligated* HHS to afford the *same protection* to the sincere beliefs of all religious objectors regardless of whether they qualify as churches under the Internal Revenue Code.[3] Indeed, "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Given RFRA's undiscriminating protection of religious liberty and its applicability to all statutes, including subsequent enactments such as the ACA, HHS lacked authority to deny sincere religious objectors the complete exemption from the contraceptive mandate that it deemed necessary to protect churches which share the exact same beliefs.

When it enacted RFRA, Congress made a sweeping statement regarding the importance of religious liberty. It recognized "free exercise of religion as an unalienable right." 42 U.S.C. § 2000bb(a)(1). It affirmed its conviction that "governments should not substantially burden religious exercise without com-

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[3] HHS delineated the churches exempt from the contraceptive mandate using a tax exemption found in the Internal Revenue Code. *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i),(iii) to define exempt churches); *see also* 26 C.F.R. § 1.6033-2(g)(i)–(ii).

pelling justification." *Id.* § 2000bb(a)(3). And it concluded that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2).

Congress's pronouncement was not merely rhetorical. It gave these sweeping statements equally sweeping effect. In RFRA, Congress provided that the government—including any "branch, department, agency, instrumentality, and official" of the United States, *id.* § 2000bb-2(1)—cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," *id.* § 2000bb-1(a). And it made this rule applicable to every federal law and every implementation of federal law whether it pre-dated RFRA's passage or was enacted thereafter. *Id.* § 2000bb-3(a). Congress in essence created a "super-statute"—a statutory command that "cut[s] across all other federal statutes (now and future, unless specifically exempted) and modif[ies] their reach." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom & the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995).

Congress offered only two narrow means for overriding the sweeping protection it afforded to religious exercise in RFRA. Congress can choose to lift RFRA's rigorous protections by "explicitly" exempting a particular enactment from its requirements. 42 U.S.C. § 2000bb-3(b). Or the government can justify imposing a substantial burden on religious exercise in a particular case by demonstrating that its actions constitute the least restrictive means of furthering a compelling governmental interest. *Id.* § 2000bb-1(b). If neither of these exceptions is satis-

fied, then the government cannot impose a burden on an individual's religious exercise regardless of whether the law is otherwise generally applicable. *Id.* § 2000bb-1.

When it enacted the ACA, Congress did not exclude RFRA's application. That means, at minimum, two things. *First*, when it enacted the ACA, Congress made a determination that the ACA's goals were not so compelling that religious objections should be required to yield to them—for if they were so compelling, Congress would have explicitly exempted the ACA from RFRA's reach. *Second*, every requirement that the ACA imposes—including the requirement to provide "preventative care"—is subject to an express *statutory* exemption available to any person who can show that the requirement places a substantial burden on their sincere religious beliefs. Only if the government shows that the burden imposed on that particular believer is the least restrictive means of furthering a compelling interest can the exemption be overcome. In this respect, the government must isolate a compelling interest *apart from the need to effectuate the burden-imposing law itself*, since the latter cannot serve as that interest in light of Congress's decision to subject the ACA to religious exceptions.

These two background rules supplied by RFRA form the statutory bounds that should have guided, and restrained, HHS when it set out to define what forms of "preventative care" individual and group health plans were required to provide. *See* 42 U.S.C. § 300gg-13(a)(4). After all, HHS's authority, even if broad, always remains subservient to clear statutory text. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct.

2427, 2444–45 (2014). Instead of respecting the statutory commands, however, HHS proceeded to issue regulations that purport to categorically narrow the scope of RFRA's protections in the context of the ACA's "preventative care" requirement by excluding from those protections any religious entity that does not qualify as a church or an integrated auxiliary of a church under the Internal Revenue Code.

Shortly after HHS issued its initial proposed list of preventative services that individual and group health plans would be required to provide, several religiously affiliated organizations objected to the requirement that their plans supply all FDA-approved contraceptive methods. *See* 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). The religious objectors pointed out that "requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom." *Id.* Many religious employers had never covered these benefits, and they objected to being forced to do so in contravention of their religious beliefs. *Id.*

HHS responded by "balanc[ing] the extension of any coverage of contraceptive services ... to as many women as possible" against "the unique relationship between certain religious employers and their employees in certain religious positions." *Id.* In making its own determination about how to appropriately strike this balance, HHS decided to offer a religious exemption to some religious objectors but not others. Churches and their integrated auxiliaries, as defined by the Internal Revenue Code, were excepted from the contraceptive mandate; all other religious

objectors were not. 78 Fed. Reg. 39870, 39873–75 (July 2, 2013); *see also* 45 C.F.R. § 147.131. According to HHS, those other objectors would be sufficiently "accommodated" if they could permit someone else to use their insurance plans to provide the contraceptives that their religious objections did not allow them to provide themselves. Unsurprisingly, the religious objectors did not find this "accommodation" satisfactory. *See* 78 Fed. Reg. at 39873–75.

In deciding to respect the concerns of some religious objectors but not others, HHS has attempted to re-strike a balance that Congress already struck when it enacted the ACA. Congress knew full well that by enacting the ACA without an exception from RFRA, it was leaving fully intact RFRA's requirements. Congress thus made a determination that the ACA's goals and policies should not be pursued at the expense of *any person's* religious liberty. HHS could not comply with RFRA by drawing categorical distinctions between groups of religious objectors: "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

In enacting RFRA, Congress did not draw distinctions between religious believers that turned on the vagaries of their status under the Internal Revenue Code, and for good reason. Just as religious beliefs do not become any less sincere or deserving of protection when the believer decides to make a living using a business organized in the corporate form, *see*

Hobby Lobby, 134 S. Ct. at 2768–72, religious beliefs do not become any less sincere or deserving of protection when the believers decide to pursue educational and charitable endeavors in accordance with their faith, *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–09 (2012). The "enigmatic" result of HHS's bifurcated exemption-accommodation scheme is that individuals who "share identical[] religious beliefs" can adhere to those beliefs when the Internal Revenue Code has declared them a church, but not "when acting as the heads of the charitable and educational arms of [that same] Church." *See, e.g.*, *Zubik v. Sebelius*, 983 F. Supp. 2d 576, 607 (W.D. Penn. 2013).

HHS's line-drawing thus contravenes the line that Congress—the *law-making* authority—decided was appropriate. Congress could have decided that the protections RFRA affords religious liberty should only apply to churches—but it did not. Congress could have decided that the "preventative care" requirement in the ACA was so important that no, or only some, religious objectors should be exempt from it—but it did not. Congress instead left RFRA fully applicable to the ACA. *See* 42 U.S.C. § 2000bb-3(a). HHS is bound to take action consistent with this legislative determination. It does not have the power to revise or reverse it.

Putting the case in a different context illustrates the point. Suppose Congress enacted a law that required any power plant that emitted pollutants to obtain a permit. And suppose further that Congress created a statutory exemption for power plants that emitted less than 100,000 tons of those pollutants

per year. Could the agency decide to "'tailor' [the] legislation to [its] bureaucratic policy goals" by offering the statutory exception only to power plants that emitted less than 500 tons of pollutants per year? *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444–45. Certainly not. To do so would be to contradict the "unambiguously expressed intent of Congress" and thus to go "well beyond the 'bounds of [the agency's] statutory authority.'" *See id.* at 2445 (citation omitted).

So too in the context of the ACA. No one would suppose that the agency could decide to limit the statutory exception for grandfathered health plans to exclude grandfathered plans that are less than ten years old. *See* 42 U.S.C. § 18011. And no one would suppose that the agency could decide to revise the statutory exception for small employers to exclude those that employ fewer than forty individuals rather than those who employ fewer than fifty. 26 U.S.C. § 4980H(c)(2)(A). There is no reason to treat the exemption for religious objectors in RFRA any differently. HHS cannot arbitrarily restrict the exemption for *all* religious objectors to tax-code-labeled churches any more than it can restrict the exception for all grandfathered plans to those that are more than ten years old or the exception for small employers to those that have fewer than forty employees.

HHS's actions in implementing the ACA demonstrate that it sees RFRA's command to protect religious exercise as a secondary consideration, subordinated to HHS's regulatory goal of distributing contraceptives. Congress could not have been more clear in declaring the opposite. In RFRA, Congress expressly exempted individuals or entities from

"rule[s] of general applicability" that "substantially burden" their "exercise of religion," 42 U.S.C. § 2000bb-1(a), and it made this exemption fully applicable to subsequent enactments such as the ACA, *id.* § 2000bb-3(a). Congress firmly decided that statutory requirements, including the ACA, *could and should* tolerate religious exceptions for *any* person whose sincere beliefs were substantially burdened. HHS had no authority to contravene or reevaluate that decision.

B. The Decision Below Is Wrong In Upholding a Purported Accommodation That Imposes a Substantial Burden On Sincere Religious Beliefs in Violation of RFRA

Contrary to RFRA's commands, it is evident from the very nature of HHS's bifurcated exemption-accommodation scheme that the agency intended to distinguish between religious objectors based on its own determinations about the import of the particular believer and the reasonableness of the particular belief. HHS knew that a substantial number of religious organizations objected to participating directly or indirectly in providing contraceptives. *See, e.g.*, 76 Fed. Reg. at 46623. Yet it automatically exempted only *some* religious objectors from the mandate: HHS effectively classified churches as more "religious" than other religious organizations based on their status under the Internal Revenue Code. *See* 78 Fed. Reg. at 39873–74 HHS implicitly decided that offering these more "religious" objectors a complete exemption from the contraceptive mandate was an appropriate way to avoid imposing a substantial burden on their beliefs. And as a result of the ex-

emption, those churches need not certify their religious beliefs, provide any notice to HHS or any other entity, or take any action that would result in the provision of abortifacients to their employees through their own healthcare plans. *See id.*; *see also* 45 C.F.R. § 147.131(a).

Although HHS does not dispute that other religious objectors, including the petitioners in this case, share sincere beliefs *identical* to those of the churches that HHS chose to exempt from the mandate, HHS has nonetheless determined that these other objectors are not deserving of identical protections. Instead, HHS offers these objectors an alternative purported "accommodation" that continues to require them to "comply" with their obligation to provide contraceptives. 78 Fed. Reg. at 39879.

To satisfy HHS's accommodation, the religious objectors must either complete a self-certification form or provide notice to HHS of their religious objections to some or all of the contraceptive methods that the mandate would otherwise require them to provide. 80 Fed. Reg. 41318, 41322–23 (July 14, 2015). Whether religious objectors complete the self-certification form or provide HHS notice, the end result is the same: Their insurers or third-party administrators will "provide coverage for contraceptive services without cost sharing to participants and beneficiaries" of the applicable plans. *Id.* at 41323; 78 Fed. Reg. at 39876.

The religious objector's self-certification or HHS notification has two important consequences. *First*, it shifts financial and some of the administrative responsibility for providing contraceptive coverage to

either the objector's insurer or, if it is self-insured, to its third-party administrator. *See* 80 Fed. Reg. at 41323; 78 Fed. Reg. at 39876. *Second*, it gives the insurer or third-party administrator the authority to use the "insurance coverage network" and the "coverage administration infrastructure" that the objector has established to provide the objected-to contraceptives. 80 Fed. Reg. at 41328–29; 78 Fed. Reg. at 39879–80. That is, rather than creating "two separate health insurance policies," 78 Fed. Reg. at 39876, the accommodation allows the insurer or third-party administrator to use the objector's own healthcare plan to provide the contraceptives. *See* 80 Fed. Reg. at 41323; 78 Fed. Reg. at 39876. In effect, then, the accommodation scheme requires the religious objectors to hand over their healthcare plans to another entity, knowing that the entity will use the plan to provide contraceptives in their stead.

This accommodation substantially burdens religious objectors' concededly sincere religious beliefs. Religious objectors like the petitioners adamantly believe that *any* facilitation of or complicity in the provision of abortifacients will have eternal ramifications. And they adamantly believe that participating in the government's proposed accommodation scheme forces them to facilitate the provision of abortifacients. But, unlike tax-code-labeled churches, the religious objectors here must comply with HHS's contraceptive mandate (directly or indirectly) or pay substantial fines. This categorical preference for churches over other, equally sincere believers is plainly absurd and should not be permitted, especially given Congress's decision not to draw such a distinction in RFRA. *See supra* at 9–10.

By deciding to afford a complete exemption to churches, HHS has already implicitly recognized that the proposed accommodation is not sufficient to avoid substantially burdening sincere religious beliefs. And rightly so. The purported accommodation gives religious objectors two choices: Take an action directly contradictory to their sincerely held religious beliefs or pay a hefty fine. That should be enough to find that the religious objectors' beliefs have been substantially burdened in violation of RFRA. *See Hobby Lobby*, 134 S. Ct. at 2777–79. After all, "the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is 'substantial' under RFRA." *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, Case Nos. 13-1540, 14-6026, 14-6028, 2015 WL 4232096, at *42 (10th Cir. July 14, 2015) (Baldock, J., dissenting in part). And the penalties the ACA imposes for non-compliance with the contraceptive mandate have already been found substantial. *Hobby Lobby*, 134 S. Ct. at 2775–77.

HHS, and the Fifth Circuit below, however, went beyond asking whether the religious objectors *did* have a sincere belief that the law demanded they violate and additionally asked whether the religious objectors *should* have held that belief in light of the legal mechanics that underlie HHS's accommodation. This inquiry crossed a line that courts and administrative agencies have no business crossing.

As this Court already held, neither HHS nor the courts have the authority to tell a religious objector

that his belief about what types of actions are immoral is "flawed" because "the connection between what the objecting parties must do ... and the end that they find to be morally wrong ... is simply too attenuated." *Hobby Lobby*, 134 S. Ct. at 2777. Instead, "the question that RFRA presents [is] ... whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Hobby Lobby*, 134 S. Ct. at 2278. Courts have "no business addressing" moral and philosophical questions regarding "whether the religious belief asserted in a RFRA case is reasonable." *Id.* Indeed, even prior to RFRA, this Court held that evaluating the reasonableness of a religious belief was simply not a task courts could or should undertake. *See id.* (citing *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969)).

Even assuming that HHS or the courts could appropriately evaluate the reasonableness of the religious objectors' beliefs, moreover, they would have no reason to second-guess the moral logic of the objectors in this case.

The accommodation scheme leaves religious objectors three choices. *First*, they can directly provide contraceptives—an act that everyone agrees would substantially burden sincerely held religious beliefs if compelled. *Second*, they can refuse to provide healthcare coverage to avoid providing contraceptives and pay substantial monetary fines instead—also an act that all agree would substantially burden

sincere religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2776–77. Or *third*, they can participate in HHS's accommodation scheme—the act that HHS claims is not a substantial burden.

This third act, however, is a substantial burden that does not functionally differ from the first. By participating in the accommodation, the religious objector authorizes the government to commandeer its healthcare plan and provide abortifacients through it. And both moral philosophers and society writ large intuitively recognize that providing material aid to those who would perform the ultimately wrongful act constitutes a morally culpable act in and of itself.

Treatises on moral philosophy expressly recognize the potential culpability of those who knowingly engage in innocent conduct that aids another in a wrongful act. As they put it, "[c]ooperation occurs 'when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does.'" *See Hobby Lobby*, 134 S. Ct. at 2778 n.34 (quoting 1 H. Davis, Moral and Pastoral Theology 341 (1935)).

Accepting this premise of moral blameworthiness, the law also recognizes that even minimal involvement in a criminal enterprise can constitute a blameworthy act. For instance, a man that allows his car to be used to transport a gun and a group intent on a committing a drug crime has aided and abetted the offense of carrying or using a gun during a drug crime. *See, e.g.*, *United States v. Bennett*, 75 F.3d 40, 45 (1st Cir. 1996); *see also Bazemore v. United States*, 138 F.3d 947, 950 (11th Cir. 1998).

And a man that allows his house to be used for a meeting where guns are displayed and discussed and later used in a drug crime has aided and abetted in the same offense. *See, e.g.*, *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1150 (1st Cir. 1995). Likewise, under the *Pinkerton* rule, a person can be found guilty for simply conspiring to commit a crime, regardless of the degree of his individual involvement or knowledge of the substantive acts charged. *See Salinas v. United States*, 522 U.S. 52, 63–64 (1997) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

The religious objectors are applying the same logic of moral culpability here. They believe that providing another (their insurer or third-party administrator) with a means (their healthcare plans) to achieve an immoral end (providing abortifacient contraceptives) is itself an immoral act. Far from being an idiosyncratic view of the degree of involvement necessary to give rise to moral blameworthiness, their view is broadly accepted as a matter of moral philosophy and criminal liability.

Because it imposes on the sincere religious beliefs of religious objectors, like petitioners, HHS's accommodation can only be justified if it is the least restrictive means of achieving a compelling interest. By their own actions, however, Congress and HHS have demonstrated that they do not view the interests underlying the ACA's contraceptive mandate as so compelling and unyielding that religious objectors must be forced to comply with it in contravention of their religious beliefs. For that reason, Congress did not exclude the ACA from RFRA's reach. And for that reason, HHS has already exempted churches

and their auxiliaries from the mandate. *See* 78 Fed. Reg. at 39873–74. There is no reason HHS cannot do the same for other religious objectors who share identical religious beliefs. Indeed, HHS already has the framework in place to do just that: It can extend the exemption applicable to churches to all nonprofit religious entities that have "consistently not provided all or the same subset of the contraceptive coverage otherwise required, at any point ... because of the religious beliefs of the organization" just as it did during the temporary enforcement safe harbor period.[4] And where it can do the same for similarly situated religious objectors, RFRA demands that it must. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

* * *

RFRA does not allow a government agency to decide what actions a religious adherent should find morally culpable. And RFRA certainly does not allow a government agency to decide that only some religious adherents should be protected from engaging in activity that they sincerely find morally culpable. Yet in designing the bifurcated exemption-

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[4] See Dep't of Health and Human Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code (reissued bulletin), at 4 (June 28, 2013) *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf.

accommodation scheme, HHS did both of these things, exceeding the scope of its constitutional and regulatory authority.

Although HHS knew that both churches and other religious entities shared the same religious objections to facilitating access to abortifacient contraceptives, the agency chose to exempt only part of that group from the mandate. It offered the rest a choice: They could comply with the mandate by authorizing others to use their healthcare plans to distribute contraceptives in their place—in direct contravention of their beliefs—or they could cease providing healthcare coverage altogether and face substantial monetary penalties.

Under the reasoning this Court employed in *Hobby Lobby*, RFRA makes this choice impermissible. As our constitutional tradition and Congress have long recognized, no person should be forced to pay a hefty fine to "express [her] beliefs and to establish [her] religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). Yet the Fifth Circuit's decision below will have precisely that effect on petitioners and many other sincere religious believers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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No. 15-35

IN THE

Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS
v.
SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the availability of a regulatory option for nonprofit religious employers to comply with the contraceptive mandate imposed by the Department of Health and Human Services eliminate either the substantial burden on religious exercise or the violation of the Religious Freedom Restoration Act that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?

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BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

Amicus curiae, The Council for Christian Colleges and Universities, respectfully submits that the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

The Council for Christian Colleges and Universities (CCCU) is an international association of Christ-centered colleges and universities. The CCCU exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." CCCU, About CCCU, http://www.cccu.org/about. Headquartered in Washington, D.C., the CCCU has 123 members in North America, all of which are regionally accredited colleges and universities with curricula rooted in the arts and sciences. In addition, the CCCU has another 60 affiliate member institutions with Christian missions. The CCCU's membership spans 33 states and 19 countries and has over 400,000 students enrolled and almost 2 million alumni.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and letters of consent are on file with the Clerk's Office.

East Texas Baptist University and Houston Baptist University are members of the CCCU. Like all CCCU member institutions, these universities are committed to applying Christian doctrine and belief to all areas of human endeavor. That includes when life begins, the morality of ending an innocent life, and the responsibility of people and institutions for complicity with provision of abortifacient products. For that reason, in an unprecedented series of lawsuits, 15 CCCU member institutions have sought to enjoin application of the federal requirement that requires member institutions to provide their students and employees with cost-free access to FDA-approved abortifacients.[2]

The Fifth Circuit's decision in this case and the similar decisions by the Second, Third, Seventh, Tenth, and District of Columbia Circuits have significant implications for the health insurance decisions of CCCU's member institutions. This is perhaps best demonstrated by the recent decision of Wheaton College to end its student health insurance plan. After an adverse ruling by the Seventh Circuit, *Wheaton Coll.* v. *Burwell*, --- F.3d ---, 2015 WL 3988356 (7th Cir. July 1, 2015), Wheaton made the difficult decision to terminate its student health insurance plan to avoid being complicit in providing abortifacient drugs and devices to Wheaton's students. Wheaton College Health Insurance Announcement (Jul. 10, 2015) *available at* http://www.wheaton.edu/Student-Life/Student-Care

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[2] The list of all CCCU member institutions' lawsuits is provided in Appendix A.

/Student-Health-Insurance/Past-Announcements/July-10th-Announcement (last visited Aug. 7, 2015).

The CCCU believes that the religious liberty guaranteed by the Constitution and the Religious Freedom Restoration Act is inconsistent with the Fifth Circuit's decision. As this Court recently explained, federal judges may not substitute their views of moral complicity for those of religious individuals and organizations. Such questions are the very type of government interference with the exercise of religion that the Religious Freedom Restoration Act was intended to prevent.

STATEMENT

Religious colleges and universities have played an important role in the history of our nation. Many of the nation's most well-known institutions of higher education including Harvard, Yale, Princeton, and Rutgers were founded by churches and denominations. Throughout the nation's history, religious institutions of higher learning have wrestled with the moral and practical implications of Christianity. Because of this, for instance, religious institutions were motivated to train abolitionists in the early 1800s who helped contribute to the end of slavery decades later. For example, the great revival preacher Charles Finney became president of Oberlin College in 1850, then a Presbyterian college, which was a hotbed for abolitionists. Harriet Beecher Stowe was the daughter of the president of Lane Seminary in Cincinnati, a center of abolitionist training in the 1830s.

The commitment to wrestle with the moral implications of being centers of learning with deep Christian convictions continues at religious colleges and universities throughout the country to this day. East Texas Baptist University, Houston Baptist University, and Westminster Theological Seminary are but three of the score of religious colleges and universities throughout the country whose commitment to Christian teaching and practice compels them to object to any participation in the provision of some or all of the contraceptive services required by the Affordable Care Act.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision and the similar decisions from other circuits of the United States Court of Appeals are flawed because they expropriate to the judiciary the theological decision of when an organization is complicit in the taking of innocent life. The District of Columbia Circuit has suggested that the government's accommodation of religious organizations like Petitioners and CCCU's other member institutions allows them to wash their hands of any involvement in the provision of morally objectionable contraceptive services to their employees and students. As the Court explained in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014), the judiciary should not be in the business of making national determinations of what does and does not constitute moral complicity.

The government's decision to exempt some religious employers from providing contraceptive coverage while requiring others to comply with the mandate demonstrates that the government's approach is not the least restrictive means necessary to advance its interests. The government concedes that when religious organizations that oppose the use of contraceptives generally or a subset of some forms of FDA-approved contraceptives that may operate as abortifacients more specifically, hire co-religionists, their employees are "less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). And the government acknowledges that exempting certain religious employers does not impair its interests. Petitioners, like all of CCCU's member institutions,

restrict their hiring of full-time faculty and administrators to co-religionists; in fact, such policy is a requirement for membership in the CCCU. These institutions engage in much of the same religious exercise that exempt religious employers engage in. They teach the faith, engage in regular corporate worship, pray, and provide faith-based volunteer and social services. In other words, the government's distinction between which groups are exempt and which are administratively accommodated is arbitrary and not necessary for the effectiveness of the Affordable Care Act nor allowed by the Constitution which forbids arbitrary distinctions in the treatment of religious groups. The government's interests would not be frustrated by exempting Petitioners (and other similar religious organizations) from complying with the contraceptive mandate. Indeed, this is precisely what the Religious Freedom Restoration Act requires.

ARGUMENT

I. The Fifth Circuit's decision conflicts with this Court's decision in *Hobby Lobby* because it resolves an inherently theological question.

The Fifth Circuit's decision fails to recognize that "[w]hat amounts to 'facilitating immoral conduct' [or] 'scandal' . . . are inherently theological questions which objective legal analysis cannot resolve and which 'federal courts have no business addressing.' " *Priests for Life* v. *United States Dep't of Health & Human Servs.*, No. 13-5368, 2015 U.S. App. LEXIS 8326, at *29 (D.C. Cir. May 20, 2015) (Brown, J. dissenting) (internal citations omitted); accord *Univ. of Notre Dame* v. *Burwell*, 786 F.3d 606, 627-28 (7th

Cir. 2015) (Flaum, J. dissenting) ("[T]he majority here sides with HHS, and "in effect tell[s] the plaintiff[ ] that [its] beliefs are flawed." (citing *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014)) (initial alteration added, remaining alterations in original)).

In *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Court faced a similar argument "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." 134 S. Ct. at 2777. The Court dispatched the argument by noting that the issue presented "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.* at 2778. The Court refused to arrogate to the judiciary the authority to provide a "binding national answer to this religious and philosophical question." *Ibid.* Nonetheless, that is exactly what the Fifth Circuit did below.

The problem with the judiciary resolving the inherently theological and philosophical issue of when a person is morally complicit is perhaps best demonstrated by the D.C. Circuit's characterization of the accommodation offered to religious organizations. The D.C. Circuit believes "the accommodation provides Plaintiffs a simple, one-step form for opting out and *washing their hands* of any

involvement in providing insurance coverage for contraceptive services," including those that the Petitioners consider to be abortifacients. *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014) (cert. pet. pending) (emphasis added). The sin of washing one's hands of involvement in the death of innocent life is central to Christianity. The Bible recounts that the Roman prefect, Pontius Pilate, before ordering that Jesus be crucified, "took water and washed his hands in the sight of the crowd, saying, 'I am innocent of this man's blood. Look to it yourselves.' " Matthew 27:24 (New Am. Bible Rev. Ed.). Nonetheless, from that time until now, Christianity has held Pilate to be morally culpable for Jesus's death despite his washed hands. (E.g., Apostles Creed ("[Jesus] suffered under Pontius Pilate, was crucified, died, and was buried.").)

The Fifth Circuit's determination of the theological issue of when a person is responsible for complicity in the death of innocent life is inconsistent with the religious beliefs of Petitioners (and many other religious individual and organizations). That conflict results in a substantial burden on Petitioners' religious exercise. The Fifth Circuit's ruling to the contrary is inconsistent with the Court's decision in *Hobby Lobby*, and the protections afforded by the Religious Freedom Restoration Act.

II. Imposition of the contraceptive mandate on religious entities like Petitioners does not advance a compelling government interest in the least restrictive manner.

It is difficult to understand how enforcing the contraceptive mandate against Petitioners is the least restrictive manner in which to protect an interest of the highest order (see 42 U.S.C. § 2000bb-1), given that the government has already conceded that it does no harm to exclude churches and integrated auxiliaries from the mandate.

Under the Affordable Care Act, employer-sponsored group health plans must meet minimum coverage requirements. These requirements include covering preventive health care services without requiring health plan participants or beneficiaries to share the costs of these services through copayments, deductibles, or co-insurance. 42 U.S.C. § 300gg-13.

The Departments of Health and Human Services, Labor, and Treasury issued regulations that require employer-sponsored group health plans to include the full range of FDA-approved contraceptive services as preventive health care services. See 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); Health Resources and Services Administration, Women's Preventive Services Guidelines, *available at* http://www.hrsa.gov/womensguidelines (last visited Aug. 7, 2015).

The Departments exempted religious employers, but limited the scope of "religious employers" to those non-profit organizations that are exempt from filing informational tax returns under the Internal

Revenue Code. 45 C.F.R. § 147.131(a) (referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)). The Internal Revenue Code provides that all tax-exempt organizations must file informational tax returns except, inter alia, "churches, their integrated auxiliaries, and conventions or associations of churches, . . . or the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A). The Departments theorized that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

Recognizing that many religious organizations that are not "churches, their integrated auxiliaries, . . . or . . . religious orders" objected to providing coverage for some or all contraceptives, the Departments devised an "accommodation" for nonexempt religious employers. See 45 C.F.R. § 147.131(c)(1). The accommodation allows certain religious nonprofit employers to fulfill their statutory obligation to provide coverage including all FDA-approved contraceptives. A similar accommodation exists for religious colleges and universities who arrange for student health insurance coverage. 45 C.F.R. § 147.131(f).

Religious colleges and universities cannot be exempt employers. Even a religious college or university that is affiliated with a church or an association of churches cannot be an "integrated

auxiliary" because colleges and universities receive more than 50% of their support from students and outside sources.[3] See 26 C.F.R. § 1.6033-2(h)(1), (h)(4). Consequently, religious colleges and universities must comply with the contraceptive mandate.

The government's decision to exempt fully a category of entities—religious employers—regardless of whether they even object to contraceptive coverage cannot be squared with its refusal to exempt other religious groups like Petitioners who actually do have religious objections. See *Hobby Lobby*, 134 S. Ct. at 2777 n.33. The government offers no persuasive reason for "distinguishing between different religious believers—burdening one while [exempting] the other—when [the government] may treat both equally by offering both of them the same [exemption]." *Id.* at 2786 (Kennedy, J. concurring). After all, "[e]verything the government says about [exempt religious employers] applies in equal measure to" Petitioners. *Gonzales* v. *O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006).

The government concedes that exempting churches and their integrated auxiliaries "does not undermine the governmental interests furthered by

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[3] Seminaries that are affiliated with a church or association of churches are exempt from the contraceptive mandate because they are exempt from the internal-support requirement. See 26 C.F.R. § 1.6033-2(h)(5). Westminster Theological Seminary is not exempt because it is not affiliated with a church or association of churches.

the contraceptive coverage requirement [because they] employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. Petitioners and all CCCU member institutions restrict their hiring practices for full-time faculty, administrators, and in many instances, all positions, to Christians. (See Pet. at 12-14 (citing Slaon Decl. 2-3; Oliver Decl. 3; Jue Decl. 3-5); CCCU, Members & Affiliates: Membership Requirements, *available at* http://www.cccu.org/members_and_affiliates (last visited Aug. 8, 2015) ("Member campuses must have a continuing institutional policy and practice . . . to hire as full-time faculty members and administrators (non-hourly staff) only persons who profess faith in Jesus Christ.").) Thus, the government cannot reasonably contend that extending the exemption to Petitioners and avoiding substantially burdening Petitioners religious exercise would undermine the government's interests.

The government's method for distinguishing between exempt religious employers and religious employers who must comply with the contraceptive mandate bears no relation to the civil rights of religious organizations that the government is obligated to protect. The Internal Revenue Code exempts churches from filing informational tax returns but not other 501(c)(3) organizations. This is understandable given that requiring churches to provide detailed financial information including the identity of all their financial supporters would impose a substantial administrative burden on

churches and could serve to chill religious exercise. But it is beyond strange to apply a distinction created by Congress to determine which nonprofit organizations must file informational returns with the IRS to decide which religious nonprofit organizations should be exempted from the contraceptive mandate to ensure that their civil rights are protected.

The government's distinction between religious nonprofits is even less defensible when applied to religious colleges and universities. Like houses of worship, the very purpose for which religious colleges and universities exist is "the propagation of a religious faith." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). For that reason, Petitioners and CCCU's member institutions engage in many of the same religious activities as houses of worship and their integrated auxiliaries including organized worship, corporate prayer, pastoral counseling, communal singing of religious songs, proselytizing, faith-based social service, and evangelistic outreach.

The government's distinction thus ultimately discriminates among "types of institutions on the basis of the nature of the religious practice [that the government perceives] these institutions are engaged in." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008). Such distinctions are at the least constitutionally suspect. See *ibid.* The government's definition of religious employer favors religions, religious denominations, and religious organizations that fit neatly into the government's view of what constitutes religious activity, while disadvantaging groups that exercise their faith

through other means such as fulfilling their educational missions or who for theological reasons are organized in ways that does not fit neatly within the government's box.

The incongruity of the government's distinction is evidenced by Petitioner Westminster Theological Seminary. Westminster's founders left Princeton Theological Seminary because of theological disagreements with the Presbyterian Church in the United States of America. For theological reasons, they decided to establish the seminary independent of the Orthodox Presbyterian Church, the denomination that the same individuals were simultaneously involved in founding. If the seminary was affiliated with the Orthodox Presbyterian Church, it would be exempt from the contraceptive mandate and the government concedes that would not frustrate its interests. Because Westminster is unaffiliated, it must comply with the mandate. The civil rights of an institution of higher education should not vary based upon whether that institution is or is not affiliated with a church or other house of worship.

In fact, the "religious employer" definition is itself offensive to religions when it defines religious employers essentially as including only houses of worship. This may be consistent with how the U.S. Department of Health and Human Services Administration views "religion." But wholly aside from the problems inherent with the accommodation, it likely violates RFRA for the Government to define religious employer in such a way as to exclude religious organizations like the CCCU's members.

The religious-employer exemption demonstrates that the government's accommodation for nonexempt religious employers is not the least restrictive means for advancing the government's interests.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Fifth Circuit should be reversed.

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AUGUST 2015

APPENDIX A

In addition to East Texas Baptist University and Houston Baptist University, the following CCCU member institutions have initiated litigation to enjoin the contraceptive mandate as to at least abortifacient contraceptive services:

1. *Southern Nazarene Univ.* v. *Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (granting preliminary injunction against enforcement of the contraceptive mandate) *rev'd sub nom. Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, --- F.3d ---, 2015 WL 4232096 (10th Cir. Jul. 14, 2015) (cert. pet. pending)

   The following CCCU members are parties:

   Southern Nazarene University

   Oklahoma Baptist University

   Oklahoma Wesleyan University

2. *Geneva Coll.* v. *Sebelius*, 960 F. Supp. 2d 588 (W.D. Pa. 2013) (granting preliminary injunction against enforcement of the contraceptive mandate) *rev'd sub. nom. Geneva Coll.* v. *Secretary U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015) (time for filing petition for writ of certiorari extended to August 11, 2015)

   The following CCCU member is a party:

   Geneva College

3. *Wheaton Coll.* v. *Burwell*, 50 F. Supp. 3d 939 (N.D. Ill. 2014) (denying preliminary injunction against enforcement of the contraceptive mandate) *aff'd* --- F.3d ---, 2015 WL 3988356 (7th Cir. 2015) (time for filing petition for writ of certiorari expires September 29, 2015).

   The following CCCU member is a party:

   Wheaton College

4. *Dordt Coll.* v. *Sebelius*, 22 F. Supp. 3d 934 (W.D. Ia. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to Eighth Circuit is pending, argued in December 2014)

   The following CCCU members are parties:

   Dordt College

   Cornerstone University

5. *Grace Schs.* v. *Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to Seventh Circuit is pending, argued in December 2014)

   The following CCCU members are parties:

   Grace College

   Biola University

6. *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013) (dismissed on mootness grounds)

The following CCCU member is a party:

Franciscan University of Steubenville

7. *School of the Ozarks, Inc.* v. *Sebelius*, --- F. Supp. 3d ---, 2015 WL 527671 (W.D. Mo. 2015) (granting summary judgment in favor of the government) (appeal to the Eighth Circuit is pending)

The following CCCU member is a party:

College of the Ozarks

8. *Louisiana Coll.* v. *Sebelius*, 38 F. Supp. 3d 766 (W.D. La. 2014) (granting summary judgment against government) (appeal to the Fifth Circuit is pending)

The following CCCU member is a party:

Louisiana College

9. *Colorado Christian Univ.* v. *Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to the Tenth Circuit is pending)

The following CCCU member is a party:

Colorado Christian University

No. 15-35

IN THE

Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY,

Petitioners,

v.

SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief of the Ethics and Religious Liberty Commission and the International Mission Board as *amici curiae* in support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

The Ethics and Religious Liberty Commission ("ERLC") is an entity of the Southern Baptist Convention ("SBC"), which is the nation's largest Protestant denomination, with over 46,000 autonomous churches and 16 million members. The ERLC is dedicated to engaging the culture with the gospel of Jesus Christ and speaking to issues in the public square for the protection of religious liberty and human flourishing. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, and the sanctity of human life. The ERLC fears the government mandate at issue in this suit threatens the Constitution's guarantee of freedom from governmental interference in matters of faith, a crucial protection upon which SBC members and adherents of other faiths depend as they follow the dictates of their consciences in the practice of their faith.

The International Mission Board ("IMB") is an entity of the SBC dedicated to taking the gospel of Jesus Christ to all nations and peoples in fulfillment of the Great Commission found in Matthew 28:18-20. The IMB employs more than 5,000 Christian workers to achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior.

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Requiring a Christian—specifically, Southern Baptist individuals or entities—to choose between violating the Government's regulations or violating their sincerely held religious beliefs substantially burdens their exercise of religion in violation of the Religious Freedom Restoration Act and the First Amendment to the United States Constitution. A fundamental aspect of Christian doctrine is its requirement that faith must govern every aspect of a Christian's life. As a matter of scriptural command, conscience, Protestant tradition, and Southern Baptist teaching, the exercise of the Christian religion must guide and determine a Christian's decisions, words, and deeds in every facet of life, including seemingly "secular" matters like the administration of insurance and the provision of certain drugs and devices.

Because of the holistic nature of the Christian faith, Baptists throughout American history have discerned a spiritual obligation to interact with and influence the culture outside the church doors. This has historically included providing for and protecting the oppressed or defenseless, including the protection of innocent and unborn human life. Southern Baptists have spoken clearly in opposition to abortion and in support of their belief that life begins at conception, beliefs that are grounded in the words of Holy Scripture.

In light of the broad scope of the Christian faith and the Southern Baptist theological opposition to abortion, the Petitioners cannot, as a matter of doctrine and conscience, distribute abortion-inducing drugs and devices directly or indirectly by

authorizing, obligating, or incentivizing a third party—and particularly their own third-party administrators—to provide such drugs and devices to others. Scripture and Southern Baptist belief prohibit not only direct and personal wrongdoing, but also the enabling, authorizing, incentivizing, or aiding of another in doing what the Christian believes to be sin. Christian doctrine teaches that believers who knowingly aid or abet another's wrongdoing have themselves done wrong. Accordingly, a statute or regulation requiring a Southern Baptist individual or ministry to be complicit in conduct that the Christian faith teaches is morally wrong forces that person or ministry into an impossible choice—to either violate conscience or violate the law—and imposes a substantial burden on the exercise of religion.

ARGUMENT

I. Christian doctrine and Southern Baptist belief require that faith govern every aspect of a Christian's life.

A fundamental aspect of Christianity is its requirement that the Christian faith govern all aspects of the believer's life. This teaching is drawn directly from the Holy Scripture and stems from the Christian belief that God's sovereignty extends over every area of human endeavor. *See, e.g., Psalm* 24:1 ("The earth is the Lord's and the fullness thereof, the world and those who dwell therein.").[2] In the words of the English theologian and poet Isaac Watts, God's

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[2] All quotations of Scripture herein are taken from the Holy Bible, English Standard Version.

"love, so amazing, so divine, demands my life, my soul, my all." Isaac Watts, *The Poetical Works of Isaac Watts, Vol. IV* 173 (1782).

Accordingly, Christianity has never limited its reach merely to matters of theology and ceremonial observance. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring) (agreeing with the Court's unanimous opinion that the job duties of a Lutheran minister engaged in education "reflected a role in conveying the Church's message and carrying out its mission" and observing that "[r]eligious teachings cover the gamut from moral conduct to metaphysical truth."); *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam) (finding a Christian humanitarian organization "'working with children, families and their communities worldwide to reach their full potential by tackling the causes of poverty and injustice'" was a religious activity); *see also* The Baptist Faith & Message 2000, Article XIII ("God is the source of all blessings, temporal and spiritual; all that we have and are we owe to Him. . . [Christians] are therefore under obligation to serve Him with their time, talents, and material possessions; and should recognize all these as entrusted to them to use for the glory of God and for helping others."), *available at* http://www.sbc.net/bfm2000/bfm2000.asp (last visited August 7, 2015).[3]

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[3] The Baptist Faith and Message is the statement of faith of the Southern Baptist Convention and summarizes Southern Baptist beliefs in areas including the Bible and its authority, the nature of God, the spiritual condition of man, God's plan of grace and salvation, evangelism and missions, education, the Christian and social order, religious liberty, and the family.

Rather, Christianity teaches that one's faith influences even those areas of life that appear superficially unrelated to worship, prayer, or theology. *See, e.g., Colossians* 3:17 ("And whatever you do, in word or deed, do everything in the name of the Lord Jesus."). Indeed, Christianity teaches there is spiritual significance in *every* part of life, including seemingly mundane acts like eating, drinking, and working. *See 1 Corinthians* 10:31 ("So whether you eat or drink or whatever you do, do all for the glory of God."); *Colossians* 3:23-24 ("Whatever you do, work heartily, as to the Lord."); *Ecclesiastes* 3:1-13 (noting "[f]or everything there is a season, and a time for every matter under heaven" and that "everyone should eat and drink and take pleasure in all his toil—this is God's gift to man"). These holistic demands of Christianity require consistency in familial, business, and social relations and are not limited to sacerdotal, ecclesial, or ritual matters.

This integration of a Christian's entire life in relation to God is an outgrowth of the Christian gospel, which provides that God, completely righteous and without sin, by His infinite grace, justifies man who is by nature unrighteous and sinful. This cannot be accomplished by any work or merit by man to somehow achieve good standing with God, but instead is accomplished by and through the work of Jesus Christ's death on the cross. Thus, by faith alone in Christ alone, man is counted righteous by God.

This doctrinal requirement that a Christian must pursue all aspects of his or her life in obedience to Christ compels Christians to do more than give mere intellectual assent. The Christian faith requires not only belief, but also conduct, and this requirement

extends to every facet of the Christian's life. *See James* 2:17 ("So also faith by itself, if it does not have works, is dead."); *Romans* 12:1 (urging Christians, "in view of God's mercy," to devote their entire beings to Him as "true and proper worship"); *see also Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013) (noting that religious belief is not confined to the home and the house of worship because "[r]eligious people do not practice their faith in that compartmentalized way."); The Baptist Faith & Message 2000, Article XV ("All Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society. . . . Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love.").

Scripture and history are replete with instances in which Christian believers who were presented with a choice either to violate their consciences by complying with the state's demands or to face draconian penalties chose to maintain the integrity of their faith in every aspect of life and accept the consequences. *See generally* John Foxe, *Acts and Monuments* (1563) (recounting anecdotes of early Protestant martyrs). For example, the Old Testament Scripture recounts the story of three Hebrew men who refused to worship an image of Babylonian King Nebuchadnezzar, despite the threat of execution for noncompliance. *See Daniel* 3:1-30. Shadrach, Meshach, and Abednego were cast "into the burning fiery furnace" for refusing to worship the king's image. *Id.* Although the Babylonian government conceived the requirement of bowing down to the image as merely an act of political loyalty, the three

young men understood it as a requirement to violate their faith through idolatry. *Id.*

Similarly, the second-century Christian martyr Polycarp was willing to suffer death for refusing to state "Caesar is Lord." *See* Justo L Gonzalez, *The Story of Christianity*, Vol. 1, 43-44 (1984). To the Roman government, the law was merely a political issue, but to Polycarp, it was an issue of idolatry. Likewise, the Protestant reformer Martin Luther, when asked to recant his beliefs, famously stated to Emperor Charles V, "[M]y conscience is captive to the Word of God. I cannot and I will not recant anything, since it is neither safe nor right to go against conscience. May God help me. Amen." Martin Luther, *Luther's Works, Vol. 33: Career of the Reformer III* (1972).

Baptist history in America abounds with examples of the doctrinal connection between faith and practice, even when that faith compelled action that ran contrary to the social mores of the day. For example, Roger Williams—founder of the first Baptist church in America—founded the only colony to prohibit slavery and tolerate religious dissenters. *See* Aaron Schwabach, *Thomas Jefferson, Slavery, and Slaves*, 33 T. Jefferson L. Rev. 1, 14 n. 73 (2010) (noting that the colony of Rhode Island, under Williams' leadership, "prohibited slavery, tolerated Quakers and Jews, and endeavored to maintain peaceful relations with the Pequod Indians, who had been the victims of massacre and enslavement by the Massachusetts settlers"). Similarly, John Leland, a widely known Baptist minister in colonial Virginia, was a staunch abolitionist and a firm voice in support of religious liberty, free from government coercion and control:

> "Does a man upon entering into social compact surrender his conscience to that society to be controled by the laws thereof . . . ?" I judge not, for the following reasons:
>
> 1. Every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in that way that he can best reconcile it to his conscience. If government can answer for individuals at the day of judgment, let men be controled by it in religious matters; otherwise let men be free.

John Leland, *The Right of Conscience Inalienable* (1791), *available at* http://berkleycenter.georgetown.edu/resources/quotes/john-leland-the-right-of-conscience-inalienable-on-religion-as-a-matter-between-god-and-individuals (last visited August 7, 2015); *see also* Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 Penn St. L. Rev. 733 (2009).

In light of these Scriptural commands, Christian doctrine, and Baptist tradition, it is no surprise that the types of work done by Petitioners, *amici*, and related Southern Baptist organizations—*e.g.*, funding and organizing international missions, educating students and church members from a Christian perspective, and providing physical and spiritual care for orphans and widows—are, in fact, spiritual obligations that are ministerial and sacred in nature. *See, e.g.*, *Matthew*. 25:37-40; *Matthew* 28:19; *James* 1:27; *see also* The Baptist Faith and

Message 2000 Art. XII ("An adequate system of Christian education is necessary to a complete spiritual program for Christ's people."); The Baptist Faith and Message 2000 Art. XV ("We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick."); SBC Resolution On Adoption and Orphan Care, 2009 ("[W]e encourage local churches to champion the evangelism of and ministry to orphans around the world."), *available at* http://www.sbc.net/resolutions/1194 (last visited August 7, 2015). In light of that spiritual duty, it is also not surprising that Petitioners refuse to quail before the government's demand to violate conscience or suffer government sanction.

In sum, because Christian doctrine requires that faith govern every aspect of a Christian's life and teaches that a Christian's conscience is captive to the word of God, Christians must act in accordance with their beliefs and in integrity of conscience in every aspect of life. Simply stated, the exercise of Christian faith must, as a matter of scriptural teaching, church tradition, and denominational doctrine, guide and determine a Christian's decisions, choices, words, and deeds, both in private and in every facet of life.

II. Scripture and Southern Baptist doctrine teach that life begins at conception and therefore abortion is the taking of innocent human life and is a grave moral wrong.

Southern Baptists have spoken clearly in opposition to abortion and in support of their belief that life begins at conception. These beliefs are grounded in the words of Holy Scripture, which teach that God's knowledge of, care for, and sovereign plan for each person begins long before birth. *See, e.g.*,

Jeremiah 1:4-5 ("Now the word of the Lord came to me, saying, 'Before I formed you in the womb I knew you, and before you were born I consecrated you; I appointed you a prophet to the nations.'"); *Psalm* 139:13-16 (noting that God "formed my inward parts . . . knitted me together in my mother's womb," and knew "the days that were formed for me, when as yet there was none of them"); *Luke* 1:39-44 (recounting that when Elizabeth, who was pregnant with John the Baptist, met Mary who would be the mother of Jesus, "the baby in [her] womb leaped for joy").

These and other Scriptural teachings can be distilled into four core principles undergirding the Baptist pro-life belief. First, God holds human life in high regard because "God created man in his own image." *Genesis* 1:27. Being made in the image of God stamps every human life with intrinsic worth and dignity. Second, Scripture teaches that a mother's womb contains a living human being created by God. Thus, abortion ends a human life. For example, in Luke 1:39-44, the inspired author of the Scripture describes the "baby" (Gr. βρεφος) in Mary's womb using the same word as is elsewhere used to describe an infant who has been born. The same scriptural passage affirms the personhood of the baby in the womb by ascribing to him the quintessentially human emotion of "joy." Third, God's word consistently condemns the killing of innocent human beings. *See, e.g., Proverbs* 6:16-17 (declaring that God "hates . . . hands that shed innocent blood."); *Psalm* 106 (describing how the "anger of the Lord was kindled" when his people "poured out innocent blood, the blood of their sons and daughters"). Finally, God calls his followers to "open your mouth for the mute, for the rights of all who are

destitute," *Proverbs* 31:8, and, as there is "opportunity[,] . . . do good to everyone," *Galatians* 6:10. No one is more mute or defenseless than the 1.2 million unborn slain annually in the United States through abortion.

In keeping with these Scriptural teachings, Southern Baptists stand firmly in support of the sanctity of human life, including the unborn. *See* The Baptist Faith and Message 2000 Art. XV ("We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death."); *id.* at Art. XVIII ("Children, from the moment of conception, are a blessing and heritage from the Lord."); *see also* SBC Resolution On Adoption and Orphan Care, 2009 ("Southern Baptists have articulated an unequivocal commitment to the sanctity of all human life, born and unborn."); SBC Resolution On Thirty Years of *Roe v. Wade*, 2003 ("The Bible affirms that the unborn baby is a person bearing the image of God from the moment of conception."); SBC Resolution on Sanctity of Human Life, 1991 ("Southern Baptists have historically affirmed biblical teaching regarding the sanctity of human life by adopting numerous pro-life resolutions at the national, state, and local levels."); SBC Resolution On Encouraging Laws Regulating Abortion, 1989 ("Southern Baptists have historically upheld the sanctity and worth of all human life, both born and preborn, as being created in the image of God."); SBC Resolution on Abortion, 1984 (noting that an unborn child "is a living individual human being").[4]

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[4] Resolutions available at http://www.sbc.net/resolutions/1194/on-adoption-and-orphan-care, http://www.sbc.net/resolutions/11

In accordance with these beliefs about unborn human life, Southern Baptists have a firm and well-known theological opposition to abortion, and the Southern Baptist Convention has repeatedly expressed its opposition to abortion in the strongest terms. *See, e.g.*, SBC Resolution On Adoption and Orphan Care, 2009 ("The satanic powers and the ravages of sin have warred against infants and children from Pharaoh to Molech to Herod and, now, through the horrors of a divorce culture, an abortion industry, and the global plagues of disease, starvation, and warfare."); SBC Resolution On Planned Parenthood, 2008 ("Scripture speaks to the sanctity of human life in the womb [] and God's abhorrence of those who murder the innocent.") (citations omitted); SBC Resolution on Sanctity of Human Life, 1991 ("[W]e . . . affirm the biblical prohibition against the taking of unborn human life except to save the life of the mother; and . . . we call on all Southern Baptists to work for the adoption of pro-life legislation in their respective states which would expand protection for unborn babies."); SBC Resolution On Encouraging Laws Regulating Abortion, 1989 ("[T]he messengers to the annual meetings of the Southern Baptist Convention during the past decade have repeatedly reaffirmed their opposition to legalized abortion, except in cases where the mother's life is immediately threatened [and] we do reaffirm our opposition to legalized abortion."); SBC Resolution on Abortion, 1984

30/on-thirty-years-of-roe-v-wade, http://www.sbc.net/resolutions/619/resolution-on-sanctity-of-human-life, http://www.sbc.net/resolutions/23/resolution-on-encouraging-laws-regulating-abortion, and http://www.sbc.net/resolutions/21/resolution-on-abortion (links last visited August 7, 2015).

(characterizing abortion-on-demand as a "national sin").[5]

In addition, Southern Baptists have expressly opposed the use of abortion-inducing drugs such as the so-called morning-after pill because such drugs kill an unborn human person. *See, e.g.*, SBC Resolution on RU 486, 1994 ("RU 486, the French abortion pill, is a direct assault on the sacredness and value of unborn human life in that this drug kills an unborn child whose heart has already started to beat."); SBC Resolution on Sanctity of Human Life, 1991 ("[W]e oppose the testing, approval, distribution, and marketing in America of new drugs and technologies which will make the practice of abortion more convenient and more widespread.").[6]

In keeping with these Baptist beliefs and historic Protestant beliefs,[7] prominent Southern Baptist

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[5] Resolutions available at http://www.sbc.net/resolutions/1194/on-adoption-and-orphan-care, http://www.sbc.net/resolutions/1191/on-planned-parenthood, http:// www.sbc.net/resolutions/619/resolution-on-sanctity-of-human-life, http://www. sbc.net/resolutions/23/resolution-on-encouraging-laws-regulating-abortion, and http://www.sbc.net/resolutions/21/resolution-on-abortion (links last visited August 7, 2015).

[6] Resolutions available at http://www.sbc.net/resolutions/25/resolution-on-ru-486-the-french-abortion-pill; http://www.sbc.net/resolutions/619/resolution-on-sanctity-of-human-life (links last visited August 7, 2015).

[7] Indeed, the Reformers denounced abortion as a grave moral evil. *See, e.g.*, Martin Luther, *Luther's Works, Vol. 4: Lectures on Genesis Chapters 21-25* at 304 (tr. Jaroslav Pelikan, 1999) ("How great, therefore, the wickedness of human nature is! How many girls there are who prevent conception and kill and expel tender fetuses, although procreation is the work of God!"); John Calvin, *Commentaries on the Last Four Books of Moses*, Vol. 3

theologians and ministers have and continue to decry the grave moral wrong of abortion. *See* R. Albert Mohler, Jr., *"I Feel Super Great About Having an Abortion"—The Culture of Death Goes Viral*, May 8, 2014; ERLC Letter to Congress on No Taxpayer Funding for Abortion Act, January 27, 2014; R. Albert Mohler, Jr., *So What if Abortion Ends a Life? Rare Candor from the Culture of Death*, February 1, 2013; R. Albert Mohler, Jr., *"Abortion is as American as Apple Pie"—The Culture of Death Finds a Voice*, January 20, 2012;[8] Carl F.H. Henry, *Has Democracy Had Its Day?* at 28-29 (1996) (commending those "who resisted the federal government's intrusion into the sphere of religious values, notably . . . the public funding of abortion"); Carl F.H. Henry, *Twighlight of a Great Civilization* at 34 (1988) ("[W]hen government engages in programs that violate Christian conscience, such as funding abortions, . . . bold protest is proper.").

These beliefs and obligations guide not only Southern Baptist ministers and individuals, but also instruct the policy and practice of all Southern Baptist ministries and entities. *See* SBC Resolution on Abortion, 1987 ("[W]e encourage all agencies and

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at 51-52 (tr. Charles Bingham, 1852) ("[T]he foetus, though enclosed in the womb of its mother, is already a human being, and it is almost a monstrous crime to rob it of the life which it has not yet begun to enjoy.").

[8] *Available at* http://www.albertmohler.com/2014/05/08/i-feel-super-great-about-having-an-abortion-the-culture-of-death-goes-viral/; http://www.erlc.com/documents/pdf/20140127-ltr-house-ntffaa.pdf; http://www.albertmohler.com/2013/02/01/so-what-if-abortion-ends-a-life-rare-candor-from-the-culture-of-death/; http://www.albertmohler.com/2012/01/20/abortion-is-as-american-as-apple-pie-the-culture-of-death-finds-a-voice/ (links last visited August 7, 2015).

institutions of the SBC to use their resources and program ministries to promote the sanctity of human life."), *available at* http://www.sbc.net/resolutions/22/resolution-on-abortion (last visited August 7, 2015).

In light of the clear Southern Baptist conviction on the sanctity of life and the moral wrong of abortion, it is no surprise that Southern Baptist entities like the Petitioners refuse to provide abortion-inducing drugs either directly or indirectly by authorizing, obligating, or incentivizing their own health care providers to provide such drugs.

III. Christian doctrine and Southern Baptist teaching state it is a sin for a Christian to enable or aid another in doing what the Christian believes to be wrong.

As a result of the holistic scope of the Christian faith and the Southern Baptist theological opposition to abortion, the Petitioners, as a matter of doctrine and conscience, cannot distribute abortion-inducing drugs and devices either directly or indirectly by authorizing, obligating, or incentivizing their own third-party administrators to provide such drugs and devices to others. Christian doctrine, like the civil and criminal law of this nation, teaches that one who knowingly aids or abets another's wrongdoing has himself done wrong. *See, e.g.*, *Matthew* 18:6 ("[W]hoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea."); *Romans* 14:13-14 ("Therefore let us not pass judgment on one another any longer, but rather decide never to put a stumbling block or hindrance in the way of a brother" and thus cause them to sin); *1 Corinthians* 8:9-13

(warning Christians to take care not to be a "stumbling block" to others and noting that by "sinning against your brothers and wounding their conscience when it is weak, you sin against Christ"); *The Larger Catechism of the Westminster Assembly* 245 (1841) ("That what is forbidden or commanded to ourselves, we are bound, according to our places, to endeavour that it may be avoided or performed by others.").

This principle applies with particular force to situations in which a Christian's action or inaction involves the taking of life. *See, e.g.*, *The Large Catechism by Martin Luther* (1529), reprinted in *Triglot Concordia: The Symbolical Books of the Ev. Lutheran Church* (1921) ("So also, if you see any one innocently sentenced to death or in like distress, and do not save him, although you know ways and means to do so, you have killed him."); Thomas Vincent, *An Explanation of the Assembly's Shorter Catechism* 171-72 (1806) ("We are forbidden to kill . . . others, either directly . . . or indirectly, by doing any thing that tendeth thereunto. . . . We may be guilty of the murder of . . . others, indirectly, by doing any thing that tendeth to take away . . . others lives.").

Congress and the States' legislatures have long recognized that one's sincere religious beliefs may prevent him from approving, authorizing, or aiding another in something the believer considers to be wrong, even if the believer is not himself committing the underlying wrong. For example, Congress exempts religious conscientious objectors not only from combat roles but from participation "in any form" in war. 50 U.S.C. App. § 456(j); *Hanna v. Secretary of the Army*, 513 F.3d 4 (1st Cir. 2008) (upholding permanent injunction exempting Coptic

Christian physician from active duty because she could not perform her chosen profession in the military context without violating her deeply held religious beliefs). Also, physicians and hospitals with a religious objection to abortion are exempt not only from performing abortion but also from assisting, making their facilities available, or even making referrals for abortion. 42 U.S.C. § 300a-7; 42 U.S.C. § 238n. Similarly, "eleven states and the federal government have adopted some type of statute or regulation to ensure that individuals are not forced to participate in executions against their will." Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 139 (2012).

The courts, like the legislatures, recognize that one's religious beliefs may prevent believers from any attenuated authorization or complicity in conduct they consider to be wrong. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1142 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) ("And the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."); *Gilardi v. U.S. Dept. of Health and Human Servcs.*, 733 F.3d 1208, 1215 (D.C. Cir. 2013), *vacated on other grounds*, 134 S. Ct. 2902 (2014) (noting that "even attenuated participation may be construed as a sin") (citation omitted); *Thomas v. Anchorage Human Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*) (recognizing a Christian landlord's sincere religious belief that unmarried cohabitation was sin merited exemption from state and local housing

laws); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (same, under Massachusetts Constitution); *State by Cooper v. French*, 460 N.W.2d 2, 7 (Minn. 1990) (same, under Minnesota Constitution). Indeed, courts have previously recognized this concept in this very context. *See Hobby Lobby*, 723 F.3d at 1140 n.15 ("The assertion that life begins at conception is familiar in modern religious discourse . . . Moral culpability for enabling a third party's supposedly immoral act is likewise familiar.").

The statutory and judicial religious exemptions enumerated above are notable for several reasons. First, none of them make the applicability of the exemption dependent on whether the religiously motivated conduct involves "sacred" or seemingly "secular" conduct. *See, e.g., Desilets*, 636 N.E.2d at 238 ("The fact that the defendants' free exercise of religion claim arises in a commercial context . . . does not mean that their constitutional rights are not substantially burdened."). Second, they recognize that religious belief not only prevents believers from engaging directly in sin but also prevent any participation, authorization, or enabling of what they consider to be sin. *See* Rienzi, 62 Emory L.J. at 139 (noting that statutory exemptions from participating in capital punishment "protect the individual not only from direct involvement—such as personally administering a lethal injection or turning on the electric chair—but also less direct involvement such as preparing the individual and apparatus used, supervising other people who will do these things, or even attending the execution.") (citation omitted). Finally, many of these exemptions involve situations involving the taking of human life, recognizing that

to compel individuals to participate in what they believe to be an unjustified taking of life imposes a grievous burden on the exercise of their beliefs.

Here, like in the foregoing examples, the Petitioners' refusal to be complicit in wrongdoing is in no way undercut by the fact that Southern Baptists, like other Christians over the past two millennia, pay taxes that may ultimately be used to fund objectionable acts. The payment of taxes is distinguishable in several ways. First, Jesus expressly commanded his followers to do so—a command given to hearers who would have found many of Caesar's activities to be objectionable—while simultaneously recognizing that payment of taxes did not forfeit a believer's primary obligations to follow God's commands. *See Mark* 12:17 ("Jesus said to them, 'Render to Caesar the things that are Caesar's, and to God the things that are God's.'"). Second, the act of paying a tax does not itself require one citizen to intentionally, directly, and personally obligate another citizen to engage in known objectionable conduct. In contrast, the HHS mandate forces the Petitioners to sign and deliver a form with the purpose of expressly authorizing the provision of abortion-inducing drugs—drugs whose sole purpose and use is inherently morally objectionable and which otherwise would not be provided. Third, the vast majority of each tax dollar paid by Petitioners is spent on things that they do not find inherently morally objectionable, a fact that comports with the Scriptural recognition that a proper function of the state is to do good and punish evil. *See Romans* 13:3-7. Here, in contrast, the certain effect of participating in the mandate scheme is to authorize, obligate, or incentivize Petitioners' third-party administrators to

engage in a specific form of conduct Petitioners find morally objectionable.

In analogous contexts, courts have implicitly recognized a distinction between complicity in wrongdoing and the mere payment of taxes. For example, the Supreme Court has recognized that a pacifist has a legitimate moral objection to being forced to work in a factory making war goods. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) The fact that Thomas also paid taxes that were used to support the war effort did not scuttle his argument that manufacturing weapons made him complicit in the war and thus violated his religious beliefs.

In sum, scriptural teaching and Southern Baptist doctrine state it is a sin for a Christian to enable or aid another in doing what the Christian believes to be wrong, and thus the Petitioners, as a matter of doctrine and conscience, cannot comply with the government's mandate to delegate to another the repugnant task of distributing abortion-inducing drugs and devices.

IV. Requiring Christians to choose between violating the Government's regulations or violating their sincerely held religious beliefs substantially burdens their exercise of religion.

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, prohibits the federal government from substantially burdening "a person's exercise of religion," *id.* at § 2000bb-1(a), unless applying that burden is the "least restrictive means of furthering . . [a] compelling governmental interest," *id.* at § 2000bb-1(b). In enacting RFRA,

Congress sought to restore the compelling interest test for defenses to claims that a facially neutral law of general applicability "substantially burdens" the free exercise of religion—a test that had been abandoned by the Supreme Court in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are: (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is *substantially burdened*.") (emphasis added). Thus, RFRA creates a statutory right to exemption from laws that substantially burden sincere religious beliefs, even if the law is neutral and generally applicable, unless the government can prove that "strict scrutiny" is met. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

The existence of a substantial burden is most apparent when the government forces a person or group to "perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (finding that compulsory formal secondary education was an undue burden on the free exercise of Amish parents' religion). Further, a substantial burden can arise indirectly if the receipt of benefits is conditioned on the performance of conduct proscribed by a religious faith, or benefits are denied because of conduct required by a religious faith. *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 717-18 (1981) (determining that a denial of unemployment benefits to an employee who had a religious objection to war was a burden on his religion).

As a threshold matter, the religious objection or conduct at issue must be both sincere and religious. *Hobby Lobby*, 723 F.3d at 1140. The religious belief is not, however, required to be central to the person's faith, 42 U.S.C. § 2000cc-5(7)(A), nor is it required to be a "correct" interpretation. *See United States v. Lee*, 455 U.S. 252, 257 (1982) ("Courts are not arbiters of scriptural interpretation."); *id.* at 261 n.12 ("It is not within 'the judicial function and judicial competence'" to decide the "proper interpretation" of religious beliefs) (quoting *Thomas*, 450 U.S. at 716).

Instead, a party must only show an "honest conviction" that the pressure from the government substantially conflicts with his religion. *Thomas*, 450 U.S. at 716. Rather than questioning the validity of the belief, the court undertaking the substantial burden analysis under RFRA should focus on the intensity of the coercion applied by the government, requiring that the restrictive law protect "interests of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Christian doctrine requires Christian individuals and entities to consistently conduct themselves in accordance with their beliefs. *See* Part I, *supra*. Furthermore, Christians should not be required to abandon the task to which they have been called by God solely because of governmental intrusion and penalties. *See* The Baptist Faith & Message 2000, Art. XVII ("Civil government being ordained by God, it is the duty of Christians to render loyal obedience thereto in all things not contrary to the revealed will of God. . . . The state has no right to impose penalties for religious opinions of any kind."), *available at* http://www.sbc.net/bfm2000/bfm2000.asp (last visited August 7, 2015). To force Southern Baptist entities

such as Petitioners to choose between paying crippling fines by conducting their ministries in accord with their religious tenets or sacrificing those core values in order to preserve the ministry is exactly the type of coercion the substantial burden test encompasses.

The Supreme Court has previously recognized that sincerely-held religious beliefs subject to government pressure at the workplace can result in a substantial burden on religion. *See Thomas*, 450 U.S. at 716 (finding a substantial burden existed when an employee, who had a religious belief against producing war materials, was denied unemployment benefits after quitting because of a transfer to a tank turret production factory); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding the denial of unemployment benefits placed a substantial burden on a Seventh-day Adventist who quit her job after being forced to work on a Saturday).

Significantly, the government has recognized this substantial burden by establishing exemptions for other religious groups cornered into making this choice. *See* 45 C.F.R. § 147.131 (2013) (allowing HRSA to exempt religious employers from requirement to cover contraceptive services under group health plan); *see generally* 78 Fed. Reg. 39870 (July 2, 2013) ("[G]roup health plans established or maintained by certain religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the otherwise applicable requirement to cover certain contraceptive services"). The inherent discrimination involved in the Government's recognition of exempt groups only compounds the burdensome nature of the fines imposed by the Government's regulations

on non-exempt groups that share the same religious views. *Sherbert*, 374 U.S. at 406 (noting a prohibition against requiring employees to work on Sunday compounds the unconstitutionality of forcing a Sabbatarian to work on Saturday).

In sum, the government's mandate substantially burden the religious exercise of Petitioners' Christian ministries by imposing draconian fines on them as a result of their acts that are specifically mandated by Christian doctrine.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court grant the petition for a writ of certiorari and set the case for plenary review of whether centuries-old religious groups may practice their traditional beliefs free from intrusive State regulation.

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No. 15-35

In the Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY, EAST TEXAS BAPTIST UNIVERSITY, AND WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATES OF TEXAS, OHIO, ALABAMA, ARIZONA, FLORIDA, GEORGIA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEVADA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Ohio, Alabama, Arizona, Florida, Georgia, Kansas, Louisiana, Michigan, Montana, Nevada, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia.[1] They have a substantial interest in the participation of religious nonprofits as vibrant and vital threads in the social fabric of the States. Religious nonprofits serve their communities in a host of ways, from caring for the most vulnerable members of society, to serving the elderly with compassion, to providing the educations that allow individuals to pursue their own contributions to society. It is paramount to the *amici* States that such religious nonprofits—including the three Texas institutions here—can continue with those contributions. Erecting impediments to their continued adherence to their religious beliefs can threaten their continued work, which is driven and shaped by those beliefs.

Moreover, the States have a substantial interest in ensuring that courts do not demean religious beliefs by second-guessing religious adherents' line-drawing about what conduct is prohibited to them as sinful or immoral. The States' interest in defending the dignity

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[1] Counsel of record for the parties received timely notice of the intent to file this amicus brief. *See* Sup. Ct. R. 32.2(b). A motion for leave to file this brief is not required. *See* Sup. Ct. R. 37.4.

of religious convictions is reflected in the States' own laws. Twenty States statutorily protect religious liberty from government intrusion.[2] Others States include in their constitutions protections that go beyond rights recognized under the Free Exercise Clause of the First Amendment.[3]

The *amici* States thus have a substantial interest in protecting religious exercise from governmental intrusion. That interest is even more acute when religious practice is burdened, not by congressional enactments, but by federal executive directives that do not pursue their ends in the manner least restrictive of religious liberty, as RFRA commands. Such executive action skirts the rules laid down in a bipartisan enactment about the respect due to religious adherents in our pluralistic society.

SUMMARY OF ARGUMENT

The government already exempts from the contraceptive mandate any "grandfathered" insurance plan, meaning a plan that has not been materially

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[2] Such general laws, often called state RFRAs, have been enacted in Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *See infra* p. 27 (citations).

[3] *See, e.g.*, Ala. Const. art. I, § 3.01; *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (holding that Article I, § 7, of the Ohio Constitution requires strict scrutiny even for a generally applicable, religion-neutral regulation that burdens religious exercise).

changed after the cutoff (which was before the contraceptive mandate was proposed). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014). That exemption is based on administrative burden to employers. Likewise, the government exempts every employer of fewer than 50 full-time workers; those employers collectively employ tens of millions of people. *See* First. Am. Compl. ¶ 12, *E. Tex. Baptist Univ. v. Sebelius*, No. 4:12-cv-03009 (S.D. Tex. Aug. 6, 2013).

Petitioners seek the same sort of treatment. In their case, it is based not on the secular burden of administrative inconvenience, but on a sincere religious conviction that complying with the disputed mandate is forbidden. The government already accommodates that religious conviction by providing an exemption for churches. Yet the Executive Branch contends that its denial of equal treatment to all employers with the same sincere religious conviction escapes any scrutiny at all under RFRA.

RFRA entitles petitioners to scrutiny of the Executive's justification for depriving them of that exemption. Petitioners share with churches the same religious conviction about providing health insurance without contracting with companies that will then have to pay for drugs regarded as abortifacients. The sincerity of that religious conviction is not disputed. And the Executive's regulation substantially burdens petitioners in seeking to abide by that religious conviction, as petitioners are subject to substantial monetary liability for noncompliance. Those conclusions establish that RFRA scrutiny applies.

In considering RFRA, however, several courts have departed from this Court's instructions in *Hobby Lobby*. Under RFRA's substantial-burden inquiry, courts should judge whether the government coerces a person to act in a way the person sincerely believes violates religious principle and whether the coercion is substantial. Going beyond that inquiry—attempting to judge whether the religious conviction has a truly substantial justification—will insert courts into areas reserved for religious debate. Religious adherents will not all have the same answers on such questions of morality. But for courts to privilege their views on such religious determinations over adherents' views undermines the respect and tolerance enshrined in laws like RFRA.

Whether RFRA directs such an approach to the substantial-burden inquiry is an important question deserving this Court's attention. There is no value to further delay. The issue has sufficiently percolated in the lower courts, and there is no prospect that the confusion will resolve itself with time.

A proper approach to the substantial-burden test will vindicate Congress's design. Rather than the Executive Branch side-stepping any scrutiny of how its contraceptive mandate comports with religious liberty, its regulatory means will be measured against other means that would achieve any compelling governmental interest animating them. That balancing reflects traditions of religious tolerance that are foundational to this country.

The Executive has not demonstrated that its mandate to petitioners is the least restrictive means

of achieving a compelling governmental interest, as RFRA requires. 42 U.S.C. § 2000bb-1. The Executive has already exempted churches and many other employers, showing its understanding that means less restrictive than the mandate will serve its general interest in promoting access to contraceptives. It is difficult to see any basis for finding a compelling governmental interest in regulating religious objectors rather than using whatever methods the government deems acceptable for employees of churches and other employers already excluded from the mandate. The court of appeals' judgment should be reversed.

ARGUMENT

Many employers around the country feel driven by their faith to care for their employees by providing them health insurance. But some employers find it incompatible with their religious convictions to provide that health insurance when it means contracting with a company that then, by virtue of that very relationship, becomes obligated to pay for drugs regarded as abortifacients. What matters under that religious belief about facilitation is not how the payment is made, but that the employer not take such a linking act. As this Court recognized just last year, the validity of such religious line-drawing is not for the courts to second-guess:

> This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the

> effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

Hobby Lobby, 134 S. Ct. at 2778 (footnote omitted).

Before the contraceptive mandate, employers could abide by that religious belief by offering health insurance without engaging in an insurance relationship that would result in payment for drugs they regard as abortifacients. After the contraceptive mandate, however, some employers are unable to abide by that religious belief without incurring substantial financial liability. If they continue to engage a company to issue or administer health insurance for their employees, that company is then and only then legally required to cover drugs that the employers regard as killing human life. The supposed "accommodation" offered by the government does not change that fact, because how a hired company pays for the drugs is immaterial to this religious belief. Hence, the mandate will coerce employers to proceed with a course of action despite a belief in its religious impermissibility, because the alternative is not providing health insurance at all and thus incurring serious fines.

Troublingly, that dilemma is faced by only some employers with those religious convictions. The Executive has recognized the religious-liberty burden and therefore exempted churches (as well their integrated

auxiliaries and associations of churches) from the contraceptive mandate, relieving them of the coercion to violate their religious beliefs in providing health insurance. Those employers can still hire an insurance issuer or administrator to provide insurance for their employees without violating their religious convictions by that act bringing about coverage for drugs regarded as abortifacients. *See Hobby Lobby*, 134 S. Ct. at 2763 (noting exemption); 45 C.F.R. § 147.131 (authorizing exemption). There is no apparent reason why the religious-liberty burden that underlies this exemption for churches does not even *count* under RFRA when felt by religious charities, schools, and other nonprofits holding the same religious beliefs.

The contraceptive mandate's ongoing coercion of employers to violate their religious convictions has led to nationwide litigation and confusion about the validity of the mandate in its full reach. Challenges remain pending in multiple circuits, and the circuit and district judges who have addressed this issue have issued lengthy opinions reaching different conclusions.

The cost of that ongoing doubt about the mandate's validity is significant; it has tremendous financial and spiritual repercussions for objecting employers. Legal challenges continue to simmer nationwide, and there is no visible prospect of orderly resolution without this Court's review. In short, the question whether the alternative method of mandate compliance justifies departure from *Hobby Lobby*'s approach to RFRA is an "important question of federal law" that warrants nationwide resolution. *See* Sup. Ct. R. 10(c); *see also Gonzales v. Raich*, 545 U.S. 1, 9 (2005) ("The

obvious importance of the case prompted our grant of certiorari.").

I. There Is Little Value To Percolation: Uncertainty About How RFRA Applies To The Contraceptive Mandate Will Continue Absent This Court's Review.

The manner in which RFRA's burden test applies to the contraceptive mandate, now that the government is relying on the mandate's self-described "accommodation," is in serious dispute. *Hobby Lobby* instructs that RFRA's substantial-burden test does not allow courts to question a religious adherent's judgment that certain conduct makes the adherent morally complicit and is therefore forbidden to them. 134 S. Ct. at 2778. Under *Hobby Lobby*, the substantial-burden test instead looks at whether a regulation "demands that [practitioners] engage in conduct that seriously violates their religious beliefs," *id.* at 2775, and whether the consequences of not yielding to the regulatory command are substantial, *id.* at 2776 (noting that the fines at issue are "surely substantial"); *id.* at 2779 ("Because the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.").

The objecting nonprofits in the many cases working their way through the courts have made clear their religious conviction that they may not include certain drugs under their insurance or hire an insurance issuer or administrator that then must use its

position to pay for those drugs. No one doubts the sincerity of that conviction. Before the mandate, the religious nonprofits could adhere to that conviction. After the mandate, the nonprofits are forced to proceed in one of those two objectionable ways, or else pay a hefty fine.

Hobby Lobby's reasoning directs that this mandate constitutes a substantial burden on the objectors' religious exercise, as it triggers serious consequences for adherents who do not behave in a way contrary to their religious beliefs. Nonetheless, several courts of appeals have held that RFRA scrutiny does not even apply because no substantial burden exists.

Their reasoning creates considerable uncertainty about RFRA's scope. Some courts overlook the full religious objection by characterizing it differently. That happened below when the court of appeals concluded, "What the regulations require of the plaintiffs here has nothing to do with providing contraceptives." Pet. App. 25a. But substantial fines coerce *petitioners themselves* to make certain arrangements, and that conduct serves as a link to the coverage outcome. Petitioners are objecting that their religion views such conduct as prohibited facilitation.

Other courts move past the coercion of adherents to act contrary to religious obligations, not by recharacterizing the religious obligations, but by deeming those obligations "de minimis" or inconsequential. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 249 (D.C. Cir. 2014) (concluding that the mandate only requires sending a single sheet of paper and thus that the mandate "imposes a *de*

minimis requirement on any eligible organization"); *Geneva Coll. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015) (deeming the asserted burden insubstantial based on a "qualitative assessment" of how the regulation "imposes on the appellees' exercise of religion").

Departing from both of those approaches, five federal judges would find a substantial burden. They reject their colleagues' reasoning as amounting to a second-guessing of religious convictions that cannot be reconciled with *Hobby Lobby*. *See* Slip op. 11, *Priests for Life*, No. 13-5368 (May 20, 2015) (Brown, J., dissenting from denial of reh'g en banc, joined by Henderson, J.) (stating that no "law or precedent grants [any court] authority to conduct an independent inquiry into the correctness of this belief"); Slip op. 8, *id.* (Kavanaugh, J., dissenting from denial of reh'g en banc) (same); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 627-28 (7th Cir. 2015) (Flaum, J., dissenting) (same); *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340-41 (11th Cir. 2014) (Pryor, J., concurring) (same). And district judges have likewise disagreed with each other about proceeding in that way. *See, e.g., E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 747 (S.D. Tex. 2013) (Rosenthal, J.) ("Several district courts have already issued opinions, with inconsistent results.").

In short, substantial confusion exists in the lower courts about the proper application of *Hobby Lobby*'s holding to religious adherents who sincerely believe that either type of conduct coerced by the contracep-

tive mandate renders the adherents complicit according to their religious principles. The question has sufficiently percolated in the lower courts, yielding a variety of approaches expressed in lengthy opinions. Delay will not yield further clarity, and the issue will be argued comprehensively here. The Court should resolve the question now.

II. The Costs Of Delay Are Significant Because Religious Adherents And Not Courts Should Decide Whether Conduct Coerced By Governmental Mandates Conflicts With Their Sincerely Held Religious Beliefs.

The Court should grant review to underscore the proper standard for finding a substantial burden on religious exercise under RFRA, and it is vitally important to do so given the effects of deviating from this Court's approach in *Hobby Lobby*.

A. The Improper Substantial-Burden Test Applied Below Adjudicates The Merits Of Adherents' Religious Beliefs.

1. Religious faith and tolerance played a tremendous role in the settlement of the colonies and the founding of the United States. *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823-24 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702-04 (2012). This country has a long tradition of governing so as to meaningfully protect the free exercise of religion. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523-24 (1993) (noting "the Nation's essential

commitment to religious freedom"). By allowing religious adherents exceptions that are equal to other religious and secular exceptions from regulation, our governments respect diverse faiths and govern by making compromises that avoid unnecessary friction between faith and law.

The Executive Branch, however, resists providing the religious believers here the exemption already accorded to their fellow believers in churches. Indeed, the exemption that the Executive refuses to petitioners here is narrower than the exclusion of other employers for secular, administrative reasons. Yet the Executive Branch contends that its decision is not even subject to *scrutiny* under RFRA, a bipartisan act of Congress following in our nation's tradition of reasonable compromise to respect religious freedom.[4]

The Executive Branch's method to avoid any scrutiny of its exemption denial is troubling. But despite this Court's instructions in *Hobby Lobby*, a number of federal courts have now accepted the Executive's invitation to judge for themselves the force of a religious conviction. That approach intrudes upon the dignity of adherents' convictions about profound religious concepts involving facilitation or complicity. It subjects those beliefs to judicial review, as if courts are well

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[4] RFRA had broad bipartisan support throughout the legislative process. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210-11 n.9 (1994). The House and Senate later approved RFRA in an almost unanimous vote. 130 Cong. Rec. S14,471 (Oct. 27, 1993); 139 Cong. Rec. H2363 (May 11, 1993).

situated to determine the substantiality of the reasons of faith animating a believer's desired exercise of religion, as opposed to the substantiality of the governmental burden on that religious exercise. That is not the inquiry required by RFRA, and it is contrary to the spirit of religious tolerance that this country holds dear.

2. In determining whether a RFRA substantial burden exists, courts have not been permitted to assess the force of a religious prohibition against particular conduct. That determination is for religion itself to draw. Under RFRA's substantial-burden analysis, courts should instead address (1) whether the religious belief that one must act or refrain from acting in a given way is sincere, and (2) whether the challenged governmental action creates substantial coercion to act contrary to that religious conviction.

As this Court explained in *Hobby Lobby*, federal courts have no business resolving a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of [what the person believes to be] an immoral act by another." 134 S. Ct. at 2778. But that is what the court of appeals' analysis here does. *See, e.g.*, Pet. App. 13a n.33 (citing *Geneva College* for the proposition that "we must . . . objectively assess whether the [adherents' conduct] does, in fact, . . . make them complicit in the provision of contraceptive coverage").

The court of appeals divided the substantial-burden analysis into three parts: "(1) What is the adherent's religious exercise? (2) Does the challenged law pressure him to modify that exercise? (3) Is the penalty for noncompliance substantial?" Pet. App. 12a-13a. It held that it would defer to the religious objector on the first question, but not on the second question. Pet. App. 13a. And the court's approach to answering that second question invites judicial review of religious belief and cannot be reconciled with *Hobby Lobby*.

Significantly, the court acknowledged that petitioners ascribe to religious principles that preclude them from "provid[ing] or facilitat[ing] access to those products" viewed as abortifacients. Pet. App. 9a. And no one disputes the sincerity of petitioners' religious conviction that they may not comply with the contraceptive mandate in either of its alternative forms. *Id.* That general regulatory scheme requires employers within its scope to "offer their employees a group health plan," Pet. App. 4a, which under agency regulations means that a company retained to issue or administer that insurance must pay for drugs seen as abortifacients. Pet. App. 5a. If an employer does not comply with the executive agency's requirement, the employer "faces draconian penalties." *Id.*

RFRA's substantial-burden test does not require adjudicating anything more. In concluding otherwise, the court of appeals reasoned that it could decide for itself whether the coerced conduct—satisfaction of the contraceptive mandate using one of two methods—"pressures" petitioners to "modify" what the court viewed as core religious exercise. But petitioners have

made clear that they find either method of satisfying the contraceptive mandate religiously objectionable.

Time and again, this Court has refused to question the boundaries, importance, or validity of a person's religious beliefs. *See, e.g.*, *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (noting that courts lack authority to decide "the interpretation of particular church doctrines and the importance of those doctrines to the religion"). The Court should confirm that principle here, holding that RFRA's substantial burden inquiry gives courts no license to go beyond finding a sincere religious objection to conduct and substantial coercion to transgress it.

3. Even if courts could check for the reasonableness of an adherent's religious conviction about complicity or facilitation, the court of appeals' application of that test in this case is problematic. The court effectively second-guessed petitioners' religious objections

by finding that coercion to take a particular course of conduct does not pressure petitioners into violating their religious beliefs. Pet. App. 12a-14a.

That course of conduct is the one that the Executive calls an "accommodation." Its basic contours are important to understanding petitioners' religious objections. That method of complying with the mandate accomplishes a single end, but in different ways by distinguishing between employers who hire an insurer to assume the risk of covering healthcare expenses and employers who themselves assume that risk while hiring an administrator to process claims. As to the former: "If an employer *with an insured plan* [objects to covering contraceptives under the plan itself], the insurer must . . . provide 'separate payments' for contraceptives for plan participants. . . . In addition, it must send a notice to participants . . . that . . . the insurer provides separate payments." Pet. App. 7a (emphasis added). As to the latter: "If an employer *with a self-insured plan* [objects to covering contraceptives under the plan itself] . . . the third-party administrator . . . must either provide separate payments . . . or arrange for an insurer or other entity to do so." Pet. App. 7a-8a (emphasis added).

Under either variant of this "accommodation" method of compliance, the employer must execute a form or notice, and that mandated document "shall be an instrument under which the plan is operated, shall be treated as a designation [by the religious employer] of the third party administrator as the plan administrator . . . for [the products], and shall supersede any earlier designation." Pet. App. 8a; *see* Pet. App. 7a (legal effect of form or notice for employer who hires an

insurer). Thus, execution of that form or notice is essential to this "accommodation" method of compliance with the mandate.

Even under this method of mandate compliance, then, it is an employer's mandated act of offering a plan that generates an issuer's or administrator's legal obligation to pay for the relevant drugs. As correctly described by the court of appeals, the insurer or third-party administrator "must . . . provide . . . payments" only where the religious employer has a mandated "insured" plan or "self-insured" plan. Pet. App. 7a.

The court of appeals understood that the religious organizations here perceive a religious obligation that their offering of insurance not be used "as vehicles for payments for contraceptives." Pet. App. 21a. That obligation is founded on religious views about facilitation or enablement of what is deemed objectionable conduct, not on legal distinctions about whether the payments are made directly through a plan or by pursuant to some other duty that still applies because the employer hired a given issuer or administrator.

Nonetheless, the court of appeals concluded that the religious employers' anti-facilitation principle is unpersuasive. Although that principle rests on religious judgments, the court offered only legal distinctions immaterial to the reasons for that religious view. Specifically, the court reasoned that "the regulations prohibit" using the plans as a vehicle to facilitate the mandated coverage. *Id.* That is so, the court determined, because "[t]he payments for contraceptives are completely independent of the plans." Pet. App. 22a;

see also Pet. App. 23a (coverage is provided "separately from the plans").

Even if that assertion could somehow undermine the "justification" for petitioners' views about complicity, the characterization is belied by the court of appeals' own analysis. Absent the mandated insurance plans, the religious employers would have no insurance issuers or administrators upon whom their coverage responsibilities would devolve through the operation of the compelled self-certification. An issuer's or administrator's coverage of the drugs exists only by virtue of the plans that the religious employers are mandated to put into place, on pain of large fines. It is facilitation through that link to which the religious employers object. Put another way, far from being completely "independent" of or "separate[]" from the drug payments, Pet. App. 22a, 23a, petitioners' mandated conduct is a prerequisite for the payments.

Three basic points should resolve the burden issue:

- The religious employers' sincere "religious beliefs forbid them from . . . facilitating access to contraceptives." Pet. App. 23a.

- These religious employers are mandated to provide insurance plans that are a prerequisite to petitioners' contractors having to cover the relevant drugs. Pet. App. 7a-8a (required payment where there is an employer "with an insured plan" or "with a self-insured plan").

- A religious employer that wants to follow the dictates of conscience by not providing that link faces "draconian penalties." Pet. App. 5a.

That is enough to trigger Congress's requirement that such regulations receive scrutiny to ensure they appropriately account for those sincere religious beliefs.

Of course, not all religious believers will conclude that their conduct in directly causing payments for drugs regarded as abortifacients makes the believers complicit in those drugs' consequences, or that use of those drugs ends human life at all. But petitioners here do hold those sincere religious beliefs, and they do not rest on a legal mistake about the regulatory scheme.

Petitioners are not raising legal claims objecting to the government providing the relevant drugs directly to anyone. Instead, petitioners' objection is to the government's insistence that they themselves play a direct role in the process by virtue of offering their (mandated) insurance plans and then, as employers steered to the "accommodation" in the mandate, execute certain documentation that has operative effect. *See* Slip op. 12, *Priests for Life*, No. 13-5368 (May 20, 2015) (Kavanaugh, J., dissenting from denial of reh'g en banc) ("[I]f the form were meaningless, why would the Government require it?").

4. *Hobby Lobby* should thus resolve the substantial-burden inquiry. Indeed, the court of appeals recognized that the violation in *Hobby Lobby* arose because large penalties "compelled the *Hobby Lobby* plaintiffs to participate in providing contraceptives, albeit in an indirect way." Pet. App. 24a-25a. And the court further acknowledged that the number of "links in the causal chain" is of no import, "given that we ac-

cept an adherent's judgment as to how much separation is enough." Pet. App. 25a. But simply asserting that an employer's provision of insurance is "completely" independent (Pet. App. 22a) from the relevant coverage obligations does not make it so. And courts have no place judging whether the degree of attenuation presents meaningful religious concerns for those who must comply with the mandate.

The court of appeals' finding of "independ[ence]" and "separat[ion]" cannot trump religious adherents' beliefs regarding facilitation. Pet. App. 22a, 23a. Just as a court must respect a religious adherent's view that manufacturing sheet metal is permissible while manufacturing tank turrets makes him too complicit in wrongdoing, *Thomas*, 450 U.S. at 715, the court of appeals' own view of how much separation is enough is of no relevance here. *Hobby Lobby*, 134 S. Ct. at 2779.

Once the red herring of "complete" separation is discarded, the burden analysis here is on all fours with *Hobby Lobby*. This is not a case like *Bowen v. Roy*, 476 U.S. 693, 704 (1986), involving internal government operations and the "mere denial of a governmental benefit." Nor is it a case like *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 450 (1988), involving government road construction that had "no tendency to coerce individuals into acting contrary to their religious beliefs." *See id.* at 449 ("In neither [*Roy* nor *Lyng*] . . . would the affected individuals be coerced by the Government's actions into violating their religious beliefs"). Rather, this is a case that involves the threat of large fines if religious em-

ployers do not comply with the Executive Branch's demand to act in a way that they understand to violate their religious principles.

B. The Federal Executive's Regulatory Overreach Intrudes On Religious Liberty.

The Executive Branch's contraceptive mandate is the latest example of an attempted aggrandizement of agency authority. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 706 (unanimously rejecting EEOC's suit against a church for its decisions about employment of a commissioned minister, and dismissing EEOC's "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers"); *Horne v. USDA*, 135 S. Ct. 2419, 2427 (2015) (rejecting the Department of Agriculture's ability to seize raisins without any compensation, noting that nothing in American legal history suggests that personal property is any less protected against physical appropriation than real property); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (rejecting EPA's interpretation of the Clean Air Act to authorize rewriting statutory thresholds for greenhouse-gas emissions in part "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

The Executive's refusal to exempt nonprofit religious organizations from the contraceptive mandate—a mandate that already excludes churches, small employers, and employers with grandfathered plans—is difficult to square with an attitude of respectful ac-

commodation of religious exercise. And the seriousness from petitioners' perspective of the Executive's unyielding mandate bears restating: Petitioners sincerely believe that compliance with this regulation is religiously forbidden because it would render them complicit in a process that in their view ends human life. Nonetheless, the coercion to comply is "draconian." Pet. App. 5a. RFRA was meant to require at least *scrutiny* of a religious adherent's claim for an exemption from such a regulation.

C. Exempting Religious Nonprofits Would Not Be Difficult And Would Afford Them Equal Treatment With Like Adherents.

Most churches, small employers, and employers with grandfathered plans are not covered by the Executive's contraceptive mandate. There is no reason to think that the Executive could not in like manner exempt religious nonprofits who identify themselves as having the same religious objection that animates the exemption for churches.

The fact that the Executive already allows so many employers an actual exemption (not an "accommodation" that is merely an alternative form of mandate compliance) is strong evidence that the government can further its interests with means less restrictive of religious liberty. The Executive cannot suggest that adherents' religious convictions differ when they meet on Sunday to determine insurance arrangements for employees of their church and when they meet on Monday to determine insurance arrangements for employees of a church-affiliated charity or

school. In the former scenario, the Executive has determined that methods other than the mandate will meet its interest in promoting access to contraceptives while respecting the religious employers' beliefs. By necessity, those same methods will achieve the government's interest while respecting other religious employers' beliefs. Indeed, the Executive has not seriously attempted to show that its alternative form of compliance with the mandate—what it calls an "accommodation"—is the method least restrictive of religious exercise for achieving a compelling governmental interest.

Rather than focusing on interests framed broadly, RFRA demands "a more focused inquiry" on "application of the challenged law to the person." *Hobby Lobby*, 134 S. Ct. at 2779 (internal quotation marks omitted); *see id.* at 2779-80 (assuming the existence of "compelling" interests framed broadly but requiring a focus on the governmental interest in the mandate to petitioners). That focus is on conscripting *these religious employers* into the government's regulatory scheme.

This cannot be the means least restrictive of religious exercise for achieving a compelling governmental interest given the existing carve-outs for numerous employers, on grounds both secular and religious. Rather than coercing employers into violating their religious beliefs, the Executive can pursue the methods it has already found acceptable with regard to employers not subject to the mandate. Those methods may be providing coverage via the government's health exchanges, providing a tax subsidy or refund, or directly

subsidizing the contraception at participating pharmacies. *See generally id.* at 2781 n.37.

D. Religious Nonprofits Are A Vital Thread In States' Social Fabric And Should Be Given Latitude To Operate In Accordance With Their Animating Religious Beliefs.

The Executive's refusal to equally exclude all religious objectors from the contraceptive mandate betrays a lack of proper concern for federal law that protects religious liberty. Religious charities, schools, and other nonprofits feel that burden heavily. *See id.* at 2785 (Kennedy, J., concurring) ("For those who choose [to believe in a divine creator], free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.").

The host of religious objectors to the contraceptive mandate include theological seminaries, schools and colleges, orders of nuns, and charities caring for orphans. They have avowedly religious missions, and their missions are part of what drives them to operate with a motive not to profit, but to contribute to societies across the nation in their own unique ways. The heavy religious burden that the Executive's mandate imposes on nonprofits faithfully serving their communities may well detract from the vigor with which they serve and even their willingness to serve at all. The *amici* States thus respectfully urge that the Court pay close attention to the important interests of these vital institutions.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

"State RFRA" Provisions

- Arizona: Ariz. Rev. Stat. § 41-1493.01
- Arkansas: 2015 SB 975, enacted April 2, 2015
- Connecticut: Conn. Gen. Stat. § 52-571b
- Florida: Fla. Stat. § 761.01 et seq.
- Idaho: Idaho Code § 73-402
- Illinois: 775 Ill. Comp. Stat. § 35/1 et seq.
- Indiana: 2015 SB 101, enacted March 26, 2015; 2015 SB 50, enacted April 2, 2015
- Kansas: Kan. Stat. § 60-5301 et seq.
- Kentucky: Ky. Rev. Stat. § 446.350
- Louisiana: La. Rev. Stat. § 13:5231 et seq.
- Mississippi: Miss. Code § 11-61-1
- Missouri: Mo. Rev. Stat. § 1.302
- New Mexico: N.M. Stat. § 28-22-1 et seq.
- Oklahoma: Okla. Stat. tit. 51, § 251 et seq.
- Pennsylvania: 71 Pa. Stat. § 2403
- Rhode Island: R.I. Gen. Laws § 42-80.1-1 et seq.
- South Carolina: S.C. Code § 1-32-10 et seq.
- Tennessee: Tenn. Code § 4-1-407
- Texas: Tex. Civ. Prac. & Rem. Code § 110.001 et seq.
- Virginia: Va. Code § 57-1 et seq.

No. 15-35

In the Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS

v.

SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPPLEMENTAL BRIEF

With the Eighth Circuit now having firmly rejected HHS's position, the government's only credible argument against plenary review—the absence of a circuit split—has vanished. In two separate opinions, the Eighth Circuit concluded that forcing religious organizations to comply with the contraceptive mandate via the regulatory means imposes a substantial burden on their religious rights and that the regulatory means is not the least restrictive means of accomplishing HHS's interests. See *Sharpe Holdings, Inc.* v. *United States Dep't of Health & Human Servs.*, No. 14-1507 (8th Cir. Sept. 17, 2015), Supp.App.1a; *Dordt Coll.* v. *Burwell*, No. 14-2726 (8th Cir. Sept. 17, 2015), Supp.App.31a.* In other words, confronted with the same mandate and the same penalties as in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), the Eighth Circuit concluded that the existence of an additional regulatory means to comply did not eliminate the RFRA violation.

It is now indisputable that the question presented here is not only of exceptional importance (as HHS has not disputed), but is also the subject of an open and acknowledged division among the Courts of Appeals. Accordingly, plenary review is essential, as only this Court can ensure that RFRA will protect the rights of all religious adherents across the Nation, and not just

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* The two appeals involved four religious nonprofits: Dordt College, Cornerstone University, CNS International Ministries, and Heartland Christian College. The lead name in the caption of the *Sharpe Holdings* case comes from a for-profit plaintiff that received relief following *Hobby Lobby* in "separate orders" "not at issue in this appeal." Supp.App.3a n.3.

those fortunate enough to find themselves within the confines of the Eighth Circuit.

The Eighth Circuit's opinions underscore why the Fifth Circuit's decision below is impossible to reconcile with this Court's precedents. Faithfully following those precedents, the Eighth Circuit correctly recognized that where, as here, "sincerity is not in dispute," courts cannot "second-guess" objectors' beliefs; their role is instead simply to "determine whether the government has placed substantial pressure" on the objectors to abandon the "religious * * * exercise at issue." Supp.App.15a, 20a. As to nonprofit religious organizations, the Eighth Circuit correctly recognized that the answer to that question follows directly from *Hobby Lobby*: there "has never been a question" that "a direct monetary penalty to coerce conduct that violates religious belief" constitutes "a substantial burden," and here, the monetary penalty for noncompliance "mirrors the substantial burden recognized by the Supreme Court in *Hobby Lobby*." *Id.* at 14a, 13a (quotation omitted). Accordingly, the Eighth Circuit had little trouble concluding that forcing religious organizations to comply with the contraceptive mandate via the regulatory means is a substantial burden on religion no less than forcing them to take action to comply with the mandate by other means.

In reaching that conclusion, the Eighth Circuit correctly rejected HHS's contention that its interposition of third parties into the process of getting contraceptive coverage to employees somehow negates the substantial burden on the religious objectors. As the court explained, that is just a reincarnation of the same failed "attenuation" argument that HHS pressed in

Hobby Lobby. To be sure, the "third parties" who purportedly eliminated the substantial burden there were the employees who would use the contraceptive benefits "provided in the group health plan," whereas the "third parties" here are the TPAs who will provide the employees with the objectionable coverage "through the group health plan." Supp.App.23a. But as the Eighth Circuit recognized, the involvement of those third parties makes no difference here for the same reason that it made no difference in *Hobby Lobby*: whether intervening steps between what the government forces an employer to do and the receipt of contraceptives eliminate complicity is a question for the religious adherent, not HHS or the courts. Any contrary conclusion would be "tantamount to 'tell[ing] the [religious objectors] that their beliefs' about complicity * * * [a]re 'flawed.'" *Ibid.* (alterations in original) (quoting *Hobby Lobby*, 134 S.Ct. at 2778-79).

The Eighth Circuit also emphasized that the "government's own litigation behavior" belies its arguments that the forms it seeks to compel religious organizations to execute are "wholly independent" of the insurer's obligations, as otherwise "there would be no need to insist on [the ministries'] compliance." Supp.App.23a. Rather, submitting the forms "accomplishes" precisely what HHS wants to achieve and the employers want to avoid: "the provision of objectionable coverage through their group health plans." *Ibid.* HHS cannot plausibly claim that it is imposing no burden on religious organizations when, by its own acknowledgement, the acts it would demand of them are critical to accomplishing HHS's desired ends.

Turning to the "'exceptionally demanding' least-restrictive-means test," the Eighth Circuit first "reiterate[d] that the government bears the burden of proof." Supp.App.25a (quoting *Hobby Lobby*, 134 S.Ct. at 2780). The court also rejected "any suggestion that * * * *Hobby Lobby* sanctioned the existing accommodation" as "dispelled" by this Court's orders in *Wheaton College* and *Zubik*, both of which expressly relieved the employer of the obligation "to self-certify by Form 700" or "to provide the detailed information and updates demanded under the revised" version of the regulatory option. *Id.* at 26a-27a. The court then found that HHS did not meet its burden of satisfying the least-restrictive means test, as it "has not shown" that "mak[ing] contraceptives available to employees through its own healthcare exchanges" or "community health centers, public clinics, and hospitals" are not "feasible means to distribute cost-free contraceptives." *Id.* at 26a, 28a, 29a; see also *Id.* at 29a (quoting *Hobby Lobby*, 134 S.Ct. at 2780) (the "most straightforward" solution would be "for the Government to assume the cost of providing the * * * contraceptives at issue"); *Ibid.* (citing Judge Rosenthal's decision below).

Perhaps the most telling aspect of the Eighth Circuit's opinions in *Sharpe* and *Dordt* is how straightforward they are. Utterly absent from the court's analysis are the metaphysical gymnastics that mark the opinions procured by HHS in other circuits, or any lengthy detour through the precise details of any employer's insurance plan. In their stead is the simple application of *Hobby Lobby* to a scenario in which employers concededly are being forced to take affirmative actions they sincerely believe violate their religious beliefs—actions that HHS itself deems both necessary

to its objectives and sufficient to put employers in compliance with the contraceptive mandate—and concededly face millions of dollars in penalties if they decline. The Eighth Circuit was not confused by HHS's self-congratulatory labeling of these affirmative requirements as an "accommodation," but correctly found that this alternative mechanism for complying with the mandate imposes a substantial burden on religion and that less-restrictive alternatives are obvious. As the Eighth Circuit's decision underscores, none of that turns on the details of what kind of plan an employer may have.

There will be ample time for HHS to attempt to rebut the Eighth Circuit's straightforward and compelling reasoning once this Court grants plenary review. But the result reached by the Eighth Circuit eliminates the only plausible argument against plenary review and underscores the pressing need for this Court's intervention. Whatever justifications HHS may have had for urging this Court to deny this petition before, those justifications are eliminated entirely by the existence of a clear and clean circuit split on the exceptionally important question presented. Accordingly, the time to resolve that question is now, and for all the reasons already discussed in the petition and the reply, this case is an ideal vehicle for this Court's view. Like the Eighth Circuit, Judge Rosenthal reached every issue in the case in definitively rejecting HHS's arguments and granting Petitioners injunctive relief. The Fifth Circuit took that relief away, and yet the Eighth Circuit has now granted that same relief to religious organizations in the Eighth Circuit. The protections of RFRA are too important for them to be

guaranteed only in the Eighth Circuit. Congress intended those protections to reach across the nation, and only this Court can make that promise a reality.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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SEPTEMBER 2015

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IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14-1507

SHARPE HOLDINGS, INC. A MISSOURI CORPORATION; RITA JOANNE WILSON, A MISSOURI RESIDENT; JUDI DIANE SCHAEFER, A MISSOURI RESIDENT; CHARLES N. SHARPE, A MISSOURI RESIDENT; CNS CORPORATION, A MISSOURI CORPORATION; OZARK NATIONAL LIFE INSURANCE COMPANY, A MISSOURI CORPORATION; N.I.S. FINANCIAL SERVICES, INC. A MISSOURI CORPORATION; CNS INTERNATIONAL MINISTRIES, A MISSOURI NON-PROFIT CORPORATION; HEARTLAND CHRISTIAN COLLEGE, A MISSOURI NON-PROFIT CORPORATION;

PLAINTIFFS-APPELLEES,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SYLVIA MATHEWS BURWELL, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, in his official capacity as the Secretary of the United States

Department of the Treasury; THOMAS E. PEREZ, in his official capacity as the Secretary of the United States Department of Labor[1]

DEFENDANTS-APPELLANTS

Appeal from United States District Court
for the Eastern District of Missouri - Hannibal

Submitted: December 10, 2014
Filed: September 17, 2015

Before: WOLLMAN, COLLOTON and BENTON, *Circuit Judges*.

WOLLMAN, *Circuit Judge*: Contending that the district court[2] abused its discretion, the Departments of Health and Human Services (HHS), Labor (DOL), and Treasury, as well as their respective Secretaries, (collectively, the government) appeal from the entry of a preliminary injunction enjoining the government from enforcing certain provisions of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. §

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[1] Secretary of Health and Human Services Sylvia Mathews Burwell is substituted for her predecessor, Kathleen Sebelius. *See* Fed. R. App. P. 43(c)(2).

[2] The Honorable David D. Noce, United States Magistrate Judge for the Eastern District of Missouri (hereinafter the district court), to whom the case was assigned by consent of the parties under 28 U.S.C. §636(c).

300gg-13, against CNS International Ministries, Inc. (CNS) and Heartland Christian College (HCC), each of which is a nonprofit religious organization that offers healthcare coverage to employees through a self-insured plan.[3] We affirm the order granting the preliminary injunction.

CNS, a Missouri nonprofit corporation with more than fifty employees, provides full-time residential services to men, women, and children with behavioral problems or who suffer from alcohol or drug dependencies, and it operates a school that serves the children of individuals in its recovery program, as well as its employees' children. HCC, also a Missouri nonprofit corporation but with fewer than fifty employees, provides post-secondary higher education to employees and residents of CNS and their dependents. Christian belief and practice are integral to the identities of both CNS and HCC, and they strive "to promote certain moral and ethical standards in their employees, including . . . a belief in the sanctity of life which precludes abortion on demand." As part of their religious mission to promote the well-being and health of their employees, both CNS and HCC offer healthcare coverage to employees through self-insured group shealth plans, although HCC, with fewer than fifty employees, is not required by the ACA to offer healthcare coverage.

Under authority granted by the ACA, HHS

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[3] In separate orders that are not at issue in this appeal, the district court granted (1) a temporary restraining order for Appellants Sharpe Holdings, Inc.; Charles N. Sharpe; Rita Joanne Wilson; and Judi Diane Schaefer and (2) a preliminary injunction for Appellants CNS Corporation; Ozark National Life Insurance Company; and N.I.S. Financial Services, Inc.

promulgated regulations requiring "group health plan[s]" and "health insurance issuer[s] offering group or individual health insurance coverage" to cover, "[w]ith respect to women, . . . preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration." 45 C.F.R. § 147.130(a)(1)(iv). At the recommendation of the Institute of Medicine, HHS adopted guidelines providing that nonexempt employers generally must provide "coverage, without cost sharing, for '[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity'" (the contraceptive mandate). 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); *see* 29 C.F.R. § 2590.715-2713(a).[4] Contraceptive methods approved by the FDA include intrauterine devices (IUDs), levonorgestrel (Plan B), and ulipristal acetate (ella), each of which "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2762-63 (2014). In general, any employer that offers employees a group health plan must comply with the contraceptive mandate or face penalties of $100 per day per affected "individual." 26 U.S.C. § 4980D(b). An employer with more than fifty employees that fails to provide employees with a group health plan is generally subject to penalties of $2,000 per year per full-time employee. *Id.* § 4980H(a), (c).

The ACA provides an exemption from the

[4] Treasury and HHS regulations were similarly revised, but we cite only to DOL regulations unless otherwise indicated.

contraceptive mandate for "grandfathered" health plans, i.e., those in existence at the time of the ACA's adoption. 42 U.S.C. § 18011; 29 C.F.R. § 2590.715-1251. The ACA also provides an exemption from the contraceptive mandate for group health plans sponsored by religious employers. 45 C.F.R. § 147.131(a) (HHS). The term "religious employer" is defined narrowly by reference to the Internal Revenue Code to include "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." *Id.* (citing the Internal Revenue Code, 26 U.S.C. § 6033(a)(3)(A)(i), (iii)). Under these exemptions, employers with grandfathered plans and religious employers may continue to offer their employees healthcare coverage that does not include contraceptives.

The regulations also provide an "accommodation" for certain religious organizations that have religious objections to the contraceptive mandate but do not qualify for the religious-employer exemption.[5] 78 Fed. Reg. 39,870, 39,871 (July 2, 5 2013); *see also* 29 C.F.R. § 2590.715-2713A. The accommodation is intended to protect religious organizations "from having to contract, arrange, pay, or refer for" contraceptive coverage. 78 Fed. Reg. at 39,872. It is available for a religious organization that (1) has religious objections

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[5] After the Supreme Court's decision in *Hobby Lobby*, the government revised the relevant regulations effective September 14, 2015, to extend this accommodation to certain closely held for-profit entities that have a religious objection to providing coverage for some or all of the FDA-approved contraceptive methods. *See* 80 Fed. Reg. 41,318 (July 14, 2015).

to providing healthcare coverage for some or all contraceptive services, (2) "is organized and operates as a nonprofit entity," (3) "holds itself out as a religious organization," and (4) complies with a self-certification process. 29 C.F.R. § 2590.715-2713A(a). A self-insured[6] religious organization, after "contract[ing] with one or more third party administrators," 29 C.F.R. § 2590.715-2713A(b)(1)(i), complies with the self-certification process in one of two ways.

The organization may self-certify by completing and submitting directly to its third-party administrator (TPA) an EBSA Form 700–Certification (Form 700), certifying that it is a religious nonprofit entity that has religious objections to providing coverage for some or all of the contraceptives required by the mandate. 29 C.F.R. § 2590.715-2713A(a)-(b). The organization may also self-certify by providing notice to HHS stating the organization's name; the basis on which it qualifies for an accommodation; its religious objections to providing coverage for some or all contraceptives, including the specific contraceptives to which it objects; its insurance plan name and type; and its TPA's name and contact

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[6] A self-insured employer bears the financial risk of paying its employees' health-insurance claims rather than contracting with a separate insurance company to provide the coverage and bear the financial risk. A self-insured employer often hires a third-party administrator to manage administrative functions like processing claims. *See, e.g.*, 1A Steven Plitt, et al., Couch on Insurance §10:1 n.1 (3d ed. 2013). Because CNS and HCC offer self-insured plans, we focus our discussion on regulations applicable to those plans.

information (HHS Notice).[7] See 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014); 80 Fed. Reg. 41,318, 41,323 (July 14, 2015); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). The religious organization must also update its HHS Notice "[i]f there is a change in any of the information required to be included." 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). According to the government, this information is "the minimum information necessary . . . to determine which entities are covered by the accommodation, to administer the accommodation, and to implement" government policy. 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014); 80 Fed. Reg. 41,318, 41,323 (July 14, 2015). After HHS receives the Notice, it provides the information to DOL, which sends a separate notification to the religious organization's TPA. *See id.*

Once a TPA receives Form 700 from the religious organization or the separate notification from DOL

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[7] This self-certification method was added to the regulations after the Supreme Court's order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). Wheaton College, a religious organization, challenged the accommodation process, arguing that completing Form 700 and forwarding the Form to its insurance issuer made it complicit in the provision of contraceptive coverage in violation of its religious beliefs. The Supreme Court granted injunctive relief, enjoining the government from enforcing the contraceptive mandate while the college's challenge to the accommodation process was pending, provided that the college inform HHS "in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Id.* at 2807. The college was not required to self-certify using Form 700. *Id.* The Court also stated, "Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the" ACA to Wheaton College's employees and students. *Id.*

"and agrees to enter into or remain in a contractual relationship with" the religious organization, the TPA must "provide or arrange payments for contraceptive services" for beneficiaries of the organization's group health plan either by providing those payments itself or by arranging for another party to do so. 29 C.F.R. § 2590.715-2713A(b)(2). The TPA is also "designat[ed] . . . plan administrator and claims administrator for contraceptive benefits" for the religious organization. 78 Fed. Reg. at 39,879. If a self-insured religious organization uses Form 700, the form becomes "an instrument under which the plan is operated [and is] treated as a designation of the [TPA] as the plan administrator under section 3(16) of ERISA[, 29 U.S.C. § 1002(33),] for any contraceptive services required to be covered." 29 C.F.R. § 2510.3-16(b). Form 700 authorizes the TPA to "provide or arrange payments for contraceptive services" and requires the TPA to provide separate notice regarding those services to participants and beneficiaries enrolled in the religious organization's group health plan. 29 C.F.R. § 2590.715-2713A(b)(2). If the self-insured religious organization instead self-certifies by HHS Notice, DOL's ensuing notification to the TPA also operates to "designate" the TPA "as plan administrator" under ERISA for contraceptive benefits. 79 Fed. Reg. at 51,095; *see also* 29 C.F.R. § 2510.3-16(b). Once the TPA receives Form 700 or notification from DOL, it also becomes eligible to be reimbursed for the full cost of contraceptive coverage, plus an additional allowance of "no less than 10 percent." 45 C.F.R. § 156.50 (HHS); 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014) (noting that HHS specifies the amount of the yearly allowance and setting that amount at fifteen percent for 2015). The

TPA must provide or arrange for separate payments for contraceptive coverage for a religious organization's plan beneficiaries "so long as [the beneficiaries] are enrolled in [the organization's] group health plan." 29 C.F.R. § 2590.715-2713A(d); *see* 45 C.F.R. § 147.131(c)(2)(i)(B) (HHS).[8]

CNS and HCC, in accordance with their sincerely held religious beliefs, oppose the use, funding, provision, or support of abortion on demand, and they believe that certain contraceptives required under the contraceptive mandate—Plan B, ella, and copper IUDs—are functionally equivalent to abortion on demand. As have a number of other religious organizations that do not qualify for the religious-employer exemption from the contraceptive mandate, CNS and HCC brought suit against the government,

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[8] It is not clear whether the ACA's implementing regulations impose a separate legal obligation on a TPA to provide contraceptive coverage to a religious organization's employees and plan beneficiaries or whether that obligation arises only after the TPA receives a copy of the organization's Form 700 or DOL notification and is thereby designated as a plan administrator for purposes of ERISA. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. at 12 n.3 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from denial of rehearing en banc); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1208 (10th Cir. 2015) (Baldock, J., dissenting in part) (discussing effect of accommodation regulations in context of self-insured nonprofit religious organizations), *petition for cert. filed*, 84 U.S.L.W. 3056 (U.S. July 23, 2015) (No. 15-105); *see also Wheaton College v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (explaining that a TPA does not have an independent obligation to provide contraceptive coverage but "bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification").

arguing that both the contraceptive mandate and the accommodation process impose a substantial burden on their exercise of religion in violation of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, and the Free Exercise Clause of the First Amendment to the U.S. Constitution. CNS and HCC contend that the government is coercing them to violate their religious beliefs by threatening to impose severe monetary penalties unless they either directly provide coverage for objectionable contraceptives through their group health plans or indirectly provide, trigger, and facilitate that objectionable coverage through the Form 700/HHS Notice accommodation process. They accordingly moved for a temporary restraining order and a preliminary injunction to enjoin enforcement of the contraceptive mandate and the accommodation regulations against them. The district court granted injunctive relief,[9] relying on an earlier order enjoining enforcement of "the ACA Mandate regulations regarding abortifacient devices and related counseling" against the for-profit plaintiffs, D. Ct. Order of Dec. 31, 2012, at 9, and reasoning that "the arguments for those plaintiffs are substantially similar to the arguments" raised by the nonprofit religious organizations, D. Ct. Order of Dec. 30, 2013, at 5.

After the notice of appeal was filed, the Supreme Court issued its order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and the government revised

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[9] The district court did not specify whether its ruling was based on the RFRA or the Free Exercise claim. Because we conclude that CNS and HCC were entitled to relief based on their RFRA claim, we decline to address their Free Exercise claim.

the accommodation regulations to permit religious organizations to self-certify using HHS Notice, as well as Form 700. We granted the parties' joint motion for permission to file supplemental briefs regarding the impact of the revised regulations on the issues presented in this appeal. CNS and HCC assert that the addition of HHS Notice as an alternative method to apply for accommodation does not alleviate the substantial burden imposed on their religious exercise, because it does "nothing more than coerce [them] into another avenue that violates their religion." They argue that they "must still submit a document that they believe wrongfully facilitates the delivery of such coverage."

The government asserts—as it did with respect to Form 700—that HHS Notice does not substantially burden CNS and HCC's exercise of religion, because the Notice does not facilitate the provision of contraceptive coverage by CNS and HCC's TPAs, which have a separate and independent legal obligation under the ACA to provide contraceptive coverage to CNS and HCC's employees. The government also argues that even if there were a substantial burden on the exercise of religion, it has employed the least restrictive means to accomplish its compelling interest in ensuring access to no-cost contraceptive coverage.

"A district court has broad discretion when ruling on [a] request[] for [a] preliminary injunction[], and we will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of that discretion." *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 803 (8th Cir. 2003) (quoting *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th

Cir. 1998)). In determining whether to grant injunctive relief, a district court generally considers "(1) the threat of irreparable harm to the movant; (2) the balance between the potential harm and any harm that granting the injunction will cause to other parties to the litigation; (3) the probability that the movant will succeed on the merits; and (4) the public interest." *Id.* (citations omitted); *see also Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir.1981)). Although "no single factor is determinative," *Dataphase*, 640 F.2d at 113, the probability-of-success factor is the most significant, *see Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013).

RFRA provides that a federal law may not "substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.[10] To state a claim under RFRA, a religious objector must show that the government substantially burdens a sincere religious exercise or belief. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). The burden then shifts to the government to show that it has a "compelling interest" in applying "the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 429-30 (quoting 42 U.S.C. § 2000bb-1(b)). To

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[10] "RFRA expressly adopted the compelling interest test 'as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

satisfy the compelling-interest requirement, the government must do more than identify "broadly formulated interests justifying the general applicability of government mandates." *Id.* at 431. The government also bears the burden of showing that "application of the burden to the person . . . is the least restrictive means of furthering" its compelling interest. *Id.* at 424. This burden-shifting approach applies even at the preliminary-injunction stage. *Id.* at 429-30.

Under RFRA, the government substantially burdens the exercise of religion when it "conditions receipt of an important benefit upon conduct proscribed by a religious faith" or "denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). In other words, governmental action substantially burdens the exercise of religion when it coerces private individuals into violating their religious beliefs or penalizes them for those beliefs by denying them the "rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

Here, the substantial burden imposed by the government on CNS and HCC's exercise of religion is the imposition of significant monetary penalties should CNS and HCC adhere to their religious beliefs and refuse to comply with the contraceptive mandate or the accommodation regulations. This burden mirrors the substantial burden recognized by the Supreme Court in *Hobby Lobby*. CNS and HCC face

the same consequences for noncompliance as did the plaintiffs in *Hobby Lobby*. 134 S. Ct. at 2759, 2775-76. Like the plaintiffs in *Hobby Lobby*, if CNS and HCC fail to comply with the challenged regulations, they will be subject to substantial monetary penalties. *See id.* at 2775-76 (citing 26 U.S.C. §§ 4980D, 4980H). When the government imposes a direct monetary penalty to coerce conduct that violates religious belief, "[t]here has never been a question" that the government "imposes a substantial burden on the exercise of religion." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. at 6 n.3 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also Hobby Lobby*, 134 S. Ct. at 2759 (imposing penalty for refusal to provide contraceptive coverage); *Wisconsin v. Yoder*, 406 U.S. 205, 208, 218 (1972) (imposing penalty for refusal to send children to high school); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (equating denial of benefits with imposition of penalty for Saturday worship); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 628 n.1 (7th Cir. 2015) (Flaum, J., dissenting) ("[O]nce we determine a religious belief is burdened, substantiality is measured by the severity of the penalties for non-compliance."). As noted by the Court in *Hobby Lobby*, "[i]f these consequences do not amount to a substantial burden, it is hard to see what would." 134 S. Ct. at 2759.

The "exercise of religion" protected under RFRA "involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in [or forborne] for religious reasons." *Hobby Lobby*, 134 S. Ct. at 2770 (internal quotation and citation omitted). "RFRA was designed to provide very broad protection for religious liberty," indeed,

protection "far beyond what [the Supreme] Court has held is constitutionally required." *Id.* at 2767. Significantly, RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and "mandate[s] that this concept be construed in favor of a broad protection of religious exercise." *Id.* at 2762 (internal quotation and citation omitted).

CNS and HCC submit that their religious beliefs prohibit them from providing healthcare coverage for certain contraceptives. They further assert that the government's purported accommodation of their religious beliefs—the requirement that they submit Form 700 or HHS Notice so that their TPA can provide the objectionable contraceptives—is no accommodation at all because it, too, substantially burdens their exercise of religion. The government does not dispute the sincerity of CNS and HCC's religious beliefs. When sincerity is not in dispute, we must consider the religious belief or exercise at issue and determine whether the government has placed substantial pressure, *i.e.*, a substantial burden, on the religious objector to engage in conduct that violates the religious belief or to abstain from engaging in conduct that is required by that belief. *See Hobby Lobby*, 134 S. Ct. at 2775-76 (concluding that substantial burden arises when the government "demands" that a religious objector either "engage in conduct that seriously violates [his] religious beliefs" or suffer "substantial" "consequences"); *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (suggesting that substantial burden may exist when the government compels a religious objector "by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that [he] find[s] objectionable for religious

reasons") (footnote omitted).

Our inquiry in this regard is necessarily constrained because "it is not within the judicial function" to determine whether a religious belief or practice comports with the tenets of a particular religion. *Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation."). Instead, we must accept a religious objector's description of his religious beliefs, regardless of whether we consider those beliefs "acceptable, logical, consistent, or comprehensible." *Id.* at 714. In other words, a religious objector is entitled to "dr[a]w a line" regarding the conduct that his religion deems permissible, and once that line is drawn, "it is not for [a court] to say that the line . . . was . . . unreasonable." *Id.* at 715. "[O]ur 'narrow function . . . in this context,'" therefore, "'is to determine' whether the line drawn reflects 'an honest conviction.'" *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Thomas*, 450 U.S. at 716).

CNS and HCC assert that their religious beliefs dictate that they abstain from conduct that furthers the government's regulatory scheme to provide their employees and plan beneficiaries with coverage for objectionable contraceptives. They argue that the accommodation provided via the Form 700/HHS Notice procedure does not eliminate the substantial burden imposed on their religious beliefs because the accommodation process itself triggers the provision of objectionable coverage by their TPAs, making them complicit in conduct that violates their religious beliefs.

The government argues that the accommodation process cannot substantially burden CNS and HCC's exercise of religion because, as a matter of law, it does

not trigger, facilitate, or make CNS and HCC complicit in the provision of that coverage. This is true, the government says, because the ACA already imposes an obligation on TPAs to provide contraceptive coverage to their employees and plan beneficiaries.

The government's argument has prevailed in several cases, in each of which the courts concluded as a matter of law that because the accommodation process does not trigger contraceptive coverage or make the religious objector complicit in the provision of that coverage, the accommodation process cannot impose a substantial burden on the exercise of religion.[11] *See Catholic Health Care Sys. v. Burwell*,

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[11] In reaching this conclusion, the courts have reasoned that "[i]t is federal law, rather than the religious organization's signing and mailing [Form 700 or HHS Notice], that requires health-care insurers, along with [TPAs] of self-insured health plans, to cover contraceptive services. By refusing to fill out the form [the religious objector] would subject itself to penalties, but [its insurer and TPA] would still be required to provide [contraceptive] services to" employees and plan beneficiaries. *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 614 (7th Cir. 2015); *see also Catholic Health Care Sys. v. Burwell*, No. 14-427, 2015 WL 4665049, at *12-13 (2d Cir. Aug. 7, 2015); *Little Sisters of the Poor*, 794 F.3d 1151, 1180-81; *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 458-62 (5th Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3050 (U.S. July 8, 2015) (No. 15-35); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 441-42 (3d Cir. 2015), *petition for cert. filed sub nom. Zubik v. Burwell*, 83 U.S.L.W. 3894 (U.S. May 29, 2015) (Nos. 14-1418, 14A1065), *and petition for cert. filed*, 84 U.S.L.W. 3096 (U.S. Aug. 11, 2015) (Nos. 15-191, 15A1); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 256 (D.C. Cir. 2014) *petition for cert. filed*, 83 U.S.L.W. 3918 (U.S. June 9, 2015) (No. 14-1453), *and petition for cert. filed sub nom. Roman Catholic Archbishop of Wash. v. Burwell*, 83 U.S.L.W. 3936 (U.S. June 19,

No. 14-427, 2015 WL 4665049, at *7 (2d Cir. Aug. 7, 2015) (noting that while the court will accept the sincerity of an objector's religious beliefs, "it must assess the nature of a claimed burden on religious exercise to determine whether, as an objective legal matter, that burden is 'substantial' under RFRA"); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015) (noting that "courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise"), *petition for cert. filed*, 84 U.S.L.W. 3056 (U.S. July 23, 2015) (No. 15-105); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 457-59 (5th Cir. 2015) (citing *Bowen*, 476 U.S. 693, and Lyng, 485 U.S. 439, as binding authority to "decid[e], as a question of law, whether the challenged law pressures the objector to modify his religious exercise), *petition for cert. filed*, 84 U.S.L.W. 3050 (U.S. July 8, 2015) (No. 15-35); *Univ. of Notre Dame*, 786 F.3d at 612 ("Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs."); *Geneva Coll. v. Sec'y U.S. Dep't of*

2015) (No. 14-1505); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 387-88 (6th Cir. 2014), *cert. granted and judgment vacated*, 135 S. Ct. 1914 (2015) (vacating and remanding for further consideration in light of *Hobby Lobby*), *and reissued and reaffirmed on remand*, Nos. 13-2723, 13-6640, 2015 WL 4979692 (6th Cir. Aug. 21, 2015); *but see Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1347 (11th Cir. 2014) (Pryor, J., specially concurring in order granting injunction pending appeal) (disagreeing with conclusion of Sixth and Seventh Circuits that "mandate imposes an independent obligation on" TPAs that "does not constitute a substantial burden").

Health & Human Servs., 778 F.3d 422, 435 (3d Cir. 2015) ("Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage."), *petition for cert. filed sub nom. Zubik v. Burwell*, 83 U.S.L.W. 3894 (U.S. May 29, 2015) (Nos. 14-1418, 14A1065), *and petition for cert. filed*, 84 U.S.L.W. 3096 (U.S. Aug. 11, 2015) (Nos. 15-191, 15A1); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014) ("Accepting the sincerity of Plaintiffs' beliefs, however, does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise . . . . Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact."), *petition for cert. filed*, 83 U.S.L.W. 3918 (U.S. June 9, 2015) (No. 14-1453), *and petition for cert. filed sub nom. Roman Catholic Archbishop of Wash. v. Burwell*, 83 U.S.L.W. 3936 (U.S. June 19, 2015) (No. 14-1505); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014) ("[A]lthough we acknowledge that the appellants believe that the regulatory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require and whether they impose a substantial burden on appellants' exercise of religion."), *cert. granted and judgment vacated*, 135 S. Ct. 1914 (2015) (vacating and remanding for further consideration in light of *Hobby Lobby*) *and reissued and reaffirmed on remand*, Nos. 13-2723, 13-6640, 2015 WL 4979692 (6th Cir. Aug. 21, 2015); *but cf.*

Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs., 756 F.3d 1339, 1340 (11th Cir. 2014) (granting motion for injunction pending appeal against enforcement of contraceptive mandate in light of *Hobby Lobby*).

As *Hobby Lobby* instructs, however, we must accept CNS and HCC's assertion that self-certification under the accommodation process—using either Form 700 or HHS Notice—would violate their sincerely held religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2778; *see also Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). It is not our role to second-guess CNS and HCC's honest assessment of a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. As discussed above, Form 700 or HHS Notice will inform CNS and HCC's TPA of its obligations to facilitate contraceptive coverage for CNS and HCC's employees and plan beneficiaries and thus will play a part in providing the objectionable contraceptives. As in *Hobby Lobby*, CNS and HCC sincerely believe that the actions "demanded by the . . . regulations [are] connected to" illicit conduct "in a way that is sufficient to make it immoral for them to" take those actions. *Id.* CNS and HCC have drawn a line between actions they find "to be consistent with [their] religious beliefs" and actions they consider "morally objectionable." *Id.* (citing *Thomas*, 450 U.S. at 715). And it is not for us

"'to say that the line [they] drew was an unreasonable one.'" *Id.* (quoting *Thomas*, 450 U.S. at 715); *see also Priests for Life*, slip op. at 12 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("Judicially second-guessing the correctness or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs is exactly what the Supreme Court in *Hobby Lobby* told us not to do.").

The government insists that because the ACA's requirement that insurance issuers and group health plans include contraceptive coverage is wholly independent of CNS and HCC's self-certification, their exercise of religion cannot be substantially burdened by the accommodation process. Even if the ACA requires that insurance issuers and group health plans include contraceptive coverage regardless of whether CNS and HCC self-certify, it also compels CNS and HCC to act in a manner that they sincerely believe would make them complicit in a grave moral wrong as the price of avoiding a ruinous financial penalty. If one equates the self-certification process with, say, that of obtaining a parade permit, then indeed the burden might well be considered light. But if one sincerely believes that completing Form 700 or HHS Notice will result in conscience-violating consequences, what some might consider an otherwise neutral act is a burden too heavy to bear. "The Supreme Court has emphasized that judges in RFRA cases may question only the sincerity of a plaintiff's religious belief, not the correctness or reasonableness of that religious belief." *Priests for Life*, slip op. at 8 (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also Eternal Word*, 756 F.3d at 1347 (Pryor, J., specially concurring in order granting injunction pending appeal) (noting that religious

objector's "legal interpretation is beside the point" because "[w]hat matters is whether the [objector's] participation in the contraception scheme—however minimal—violates its religious beliefs"); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, Nos. 13-1540, 14-6026, 14-6028, 2015 WL 5166807, at *2 (10th Cir. Sept. 3, 2015) (Hartz, J., dissenting from denial of rehearing en banc) ("I am aware of no precedent holding that a person's free exercise was not substantially burdened when a significant penalty was imposed for refusing to do something prohibited by the person's sincere religious beliefs (however strange, or even silly, the court may consider those beliefs)."); *Grace Schs. v. Burwell*, Nos. 14-1430, 14-1431, 2015 WL 5167841, at *18 (7th Cir. Sept. 4, 2015) (Manion, J., dissenting). Religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others" to deserve protection. *Thomas*, 450 U.S. at 714. The question here is not whether CNS and HCC have correctly interpreted the law, but whether they have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually complicit in providing abortifacient coverage. Their affirmative answer to that question is not for us to dispute.

As it did in *Hobby Lobby*, the government argues here that CNS and HCC's objection to the contraceptive mandate is really an objection to the conduct of third parties and that "the connection between what [CNS and HCC] must do . . . and the end that they find to be morally wrong . . . is simply too attenuated." *See Hobby Lobby*, 134 S. Ct. at 2777. In *Hobby Lobby*, the third parties were the plaintiffs' employees who would use the contraceptive benefits provided in the group health plan. Here, the third

parties are TPAs, who will provide the objectionable coverage to CNS and HCC's employees through the group health plan. The Supreme Court rejected this argument in *Hobby Lobby*, characterizing it as tantamount to "tell[ing] the [religious objectors] that their beliefs" about complicity in the provision of contraceptive coverage were "flawed," "mistaken[,] or insubstantial"—moral and philosophical judgments that are not for the courts to make. *Id.* at 2778-79. Instead, when a religious objector deems the required conduct to cross the line of morally and religiously acceptable behavior, "it is not for us to say that their religious beliefs are mistaken or insubstantial." *Id.* at 2779.

The government also argues that the self-certification process cannot substantially burden CNS and HCC's exercise of religion because they were already instructing their TPA not to provide contraceptive coverage and thus had already declared their religious objection to such devices and products. What this argument fails to appreciate, however, is that self-certification under the accommodation process accomplishes what CNS and HCC's prior instructions had specifically prevented: the provision of objectionable coverage through their group health plans. We need look no further than to the government's own litigation behavior to gauge the importance of self-certification in the regulatory scheme. If TPAs had a wholly independent obligation to provide contraceptive coverage to religious objectors' employees and plan beneficiaries, there would be no need to insist on CNS and HCC's compliance with the accommodation process.

In light of CNS and HCC's sincerely held religious

beliefs, we conclude that compelling their participation in the accommodation process by threat of severe monetary penalty is a substantial burden on their exercise of religion. *See Hobby Lobby*, 134 S. Ct. at 2778 ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, [the government] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step."). That they themselves do not have to arrange or pay for objectionable contraceptive coverage is not determinative of whether the required or forbidden act is or is not religiously offensive. *See id.* at 2778; *Thomas*, 450 U.S. at 715. We thus conclude that CNS and HCC have shown a substantial likelihood of success on the merits of their claim that the contraceptive mandate and accommodation process impose a substantial burden on their religious beliefs.

The question remains whether the government has established a compelling interest which it has used the least restrictive means to further. As noted above, under RFRA, the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The government must "demonstrate that the compelling interest test is satisfied through application of the challenged law to . . . the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 430-31). "[B]roadly formulated," *O Centro*, 546 U.S. at 431, or "sweeping" governmental interests are inadequate, *Yoder*, 406 U.S. at 221. Rather, the government must

show with "particularity how [even] admittedly strong interest[s] . . . would be adversely affected by granting an exemption" to a particular claimant. *Id.* at 236.

The government has asserted that its compelling interests in safeguarding public health and in ensuring that women have equal access to health care are furthered by the contraceptive mandate and the accommodation process. *See* 78 Fed. Reg. at 39,872. In *Hobby Lobby*, Justice Alito, writing for the Court, "assume[d] that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA." 134 S. Ct. at 2780. As did the Supreme Court, we will entertain the same assumption and proceed to consider whether the government has shown that the contraceptive mandate and accommodation process are the least restrictive means of furthering the government's compelling interests. *See Hobby Lobby*, 134 S. Ct. at 2780.

Under the "exceptionally demanding" least-restrictive-means test, *Hobby Lobby*, 134 S. Ct. at 2780, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on . . . protected activity, [the government] may not choose the way of greater interference," *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Thus, a regulation may constitute the least restrictive means of furthering the government's compelling interests if "no alternative forms of regulation" would accomplish those interests without infringing on a claimant's religious-exercise rights. *See Sherbert*, 374 U.S. at 407.

We first reiterate that the government bears the burden of proof on this issue, which requires it to come forward with evidence that the contraceptive mandate

and the accommodation process are the only feasible means to distribute cost-free contraceptives to women employed by religious organizations and that no alternative means would suffice to achieve its compelling interest. It must show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by" CNS and HCC. *Hobby Lobby*, 134 S. Ct. at 2780.

In *Hobby Lobby*, the Supreme Court determined that the accommodation process was "less restrictive than requiring employers to [directly] fund contraceptive methods that violate their religious beliefs." *Id.* at 2782. But the Court also emphasized that it was specifically "not decid[ing] . . . whether an approach of this type complies with RFRA for purposes of all religious claims." *Id.* It simply suggested that the accommodation process would be an acceptable alternative for organizations that did not assert a religious objection to the accommodation process itself. *See id.* at 2782 & n.40 ("The less restrictive approach we describe accommodates the religious beliefs *asserted in these cases*, and that is the only question we are permitted to address." (emphasis added)); *id.* at 2786 (Kennedy, J., concurring) (noting that "the plaintiffs have not criticized [the accommodation process] with a specific objection that has been considered in detail").

Any suggestion that the Court in *Hobby Lobby* sanctioned the existing accommodation process for all purposes was dispelled only days later when the Court issued its order in *Wheaton College* and enjoined enforcement of the contraceptive mandate and the Form 700 accommodation regulations as long as Wheaton College directly notified HHS of its religious

objection. 134 S. Ct. at 2807. The college was not required to self-certify by Form 700 to obtain an accommodation, and it was not required to provide the detailed information and updates demanded under the revised accommodation regulations establishing HHS Notice. *See Wheaton College*, 134 S. Ct. at 2807; *see also Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S. Ct. 1022 (2014) (enjoining government from enforcing contraceptive mandate if written notice is provided to HHS stating that objectors "are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services"). And on June 29, 2015, the Supreme Court granted injunctive relief for the third time in another case involving a nonprofit religious organization. *Zubik v. Burwell*, 135 S. Ct. 2924 (2015) (order enjoining enforcement of the "challenged provisions" of the ACA pending final disposition of their petition for certiorari, provided that *Wheaton College* notice is submitted to HHS). Thus, in *Wheaton College*, *Little Sisters of the Poor*, and Zubik, the Supreme Court approved a method of notice to HHS that is arguably less onerous than either Form 700 or HHS Notice yet permits the government to further its interests. Although the Court's orders were not final rulings on the merits, they at the very least collectively constitute a signal that less restrictive means exist by which the government may further its interests. *See Priests for Life*, slip op. at 23 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("[R]egardless of whether we as a lower court are *formally* bound by the Supreme Court stay orders in *Wheaton College* and *Little Sisters of the Poor*, the notice identified by the Supreme Court in those two

cases is undoubtedly a less restrictive way for the Government to further its interest than [Form 700 or HHS Notice]."). If the employer's TPA is known to the government, then there should be no cost to allowing the less onerous notice. Even if the TPAs are not known, the government has not shown at this stage of the proceedings that the inconvenience of identifying the TPAs likely would create an administrative problem of sufficient magnitude to make the entire scheme unworkable. *See Sherbert*, 374 U.S. at 408-09; *Bowen*, 476 U.S. at 731 (O'Connor, J., concurring in part and dissenting in part).

In addition, notice similar to that sanctioned by the Supreme Court in *Wheaton College* and Zubik will not affect the ability of CNS and HCC's employees and plan beneficiaries to obtain contraceptive coverage or "preclude the Government from relying on th[e] notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the" ACA. *Wheaton College*, 134 S. Ct. at 2807; *Zubik*, 135 S. Ct. at 2924 (same). The impact a religious accommodation may have on third parties is an important factor, because it "will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest." *Hobby Lobby*, 134 S. Ct. at 2781 n.37; *see also* id. at 2760 (observing that "the effect of the . . . accommodation on the women employed by Hobby Lobby . . . would be precisely zero" because they "would still be entitled to all FDA-approved contraceptives without cost sharing").

CNS and HCC also suggest other less restrictive means that could accomplish the government's objectives and relieve the substantial burden on their

exercise of religion. These include what the Court in *Hobby Lobby* characterized as "[t]he most straightforward way of doing this," namely, "for the Government to assume the cost of providing the . . . contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 134 S. Ct. at 2780. "[C]ost may be an important factor in the least- restrictive means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." *Id.* at 2781. CNS and HCC urge that the government could provide subsidies, reimbursements, tax credits, or tax deductions to employees, or that the government could pay for the distribution of contraceptives at community health centers, public clinics, and hospitals with income-based support. On the minimal record thus far developed, the government has not shown that these alternatives are infeasible. *See Korte v. Sebelius*, 735 F.3d 654, 686-87 (7th Cir. 2013); *Univ. of Notre Dame*, 786 F.3d at 630 (Flaum, J., dissenting); *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 770 (S.D. Tex. 2013), *rev'd on other grounds*, 793 F.3d 449.

CNS and HCC also propose that the government could make contraceptives available to employees through its own healthcare exchanges. Under this approach, the government "could treat employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage at all." *Priests for Life*, slip op. at 17 (Brown, J., dissenting from denial of rehearing en banc). "[I]f a less restrictive means is available for the Government to achieve its goals, the

Government must use it." *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). As the government must prove that its proposed mandate is the only feasible and effective means of achieving the asserted compelling interests, we cannot say on this limited record that the government has eliminated the use of healthcare exchanges as a viable option.

Applying the substantial-burden test set forth in *Hobby Lobby*, we conclude that CNS and HCC have established that they are likely to succeed on the merits of their RFRA challenge to the contraceptive mandate and the accommodation regulations—the most significant factor in determining whether a preliminary injunction should issue. *See Home Instead, Inc.*, 721 F.3d at 497. They have also established that in the absence of an injunction they will be forced to violate their sincerely held religious beliefs by complying with either the contraceptive mandate or the accommodation process or to incur severe monetary penalties for refusing to comply. Keeping in mind the deference we owe the district court in reviewing a decision to grant injunctive relief, we conclude that it did not abuse its discretion in finding that CNS and HCC were substantially likely to succeed on the merits of their claim that the contraceptive mandate and the accommodation process substantially burden their exercise of religion in violation of RFRA and that the current accommodation process is not the least restrictive means of furthering the government's interests. We therefore affirm the district court's order granting injunctive relief.

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14-2726

DORDT COLLEGE; CORNERSTONE UNIVERSITY

PLAINTIFFS-APPELLEES,

v.

SYLVIA M. BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor; JACK LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY

DEFENDANTS-APPELLANTS

Appeal from United States District Court
for the Northern District of Iowa - Sioux City

Submitted: December 10, 2014
Filed: September 17, 2015

Before: WOLLMAN, COLLOTON and BENTON, *Circuit Judges*.

WOLLMAN, *Circuit Judge*: The Departments of Health and Human Services (HHS), Labor (DOL), and Treasury, as well as their respective Secretaries, (collectively, the government) appeal from the district court's[12] order granting a motion for a preliminary injunction that enjoins the government from enforcing certain provisions of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 300gg-13(a)(4), and its implementing regulations against Dordt College and Cornerstone University, each of which is a nonprofit religious educational institution that offers healthcare coverage to its employees—Dordt through a self-insured plan and Cornerstone through an insured plan.[13] The district court's order also enjoined the government from enforcing the challenged provisions against "any insurance provider (including insurance issuers and third-party administrators) offering health insurance to Dordt or Cornerstone." D. Ct. Order of May 21, 2014, at 8. Dordt and Cornerstone raised objections to the ACA and its implementing regulations that are substantially similar to those addressed by this court in the opinion issued today in *Sharpe Holdings, Inc. v. U.S. Department of Health*

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[12] The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa.

[13] A self-insured employer bears the financial risk of paying its employees' health-insurance claims and often hires a third-party administrator to manage administrative functions like processing insurance claims. An insured employer, by contrast, contracts with a separate insurance company to provide healthcare coverage, bear the financial risk of insurance claims, and manage related administrative functions. *See, e.g.*, 1A Steven Plitt, et al., Couch on Insurance § 10:1 n.1 (3d ed. 2013).

and Human Services, No. 14-1507, slip op. (8th Cir. Sept. 17, 2015). For purposes of this opinion, we provide only a brief discussion of the legislative and administrative background of the ACA and its implementing regulations, as well as an abbreviated summary of the arguments raised by the parties. For a more detailed examination, we direct readers to our opinion in *Sharpe Holdings*.

Dordt and Cornerstone challenged provisions of the ACA and its implementing regulations requiring them either to provide their employees with healthcare coverage for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" (the contraceptive mandate), or to apply for an accommodation excusing them from providing such coverage. 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); *see* 29 C.F.R. § 2590.715-2713(a). Although the ACA provides an exemption from the contraceptive mandate for "grandfathered" health plans, *i.e.*, those in existence at the time of the ACA's adoption, 42 U.S.C. § 18011; 29 C.F.R. § 2590.715-1251, and for health plans sponsored by "religious employers," *i.e.*, "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," 45 C.F.R. § 147.131(a) (citing the Internal Revenue Code, 26 U.S.C. § 6033(a)(3)(A)(i), (iii)), it does not provide a similar exemption for nonprofit religious organizations like Dordt and Cornerstone.

Instead, the ACA provides an "accommodation" for nonprofit religious organizations that have religious objections to the contraceptive mandate but do not

qualify for the religious-employer exemption.[14] 78 Fed. Reg. 39,870, 39,871 (July 2, 2013); *see also* 29 C.F.R. § 2590.715-2713A. The accommodation is intended to protect religious organizations "from having to contract, arrange, pay, or refer for" contraceptive coverage. 78 Fed. Reg. at 39,872. It is available for a religious organization that (1) has religious objections to providing healthcare coverage for some or all contraceptive services, (2) "is organized and operates as a nonprofit entity," (3) "holds itself out as a religious organization," and (4) complies with a self-certification process. 29 C.F.R. § 2590.715-2713A(a). A religious organization may self-certify by completing and submitting directly to its insurance issuer or third-party administrator (TPA) an EBSA Form 700–Certification (Form 700), certifying that it is a religious nonprofit entity that has religious objections to providing coverage for some or all of the contraceptives required by the mandate, 29 C.F.R. § 2590.715- 2713A(a)-(b), or by providing notice to HHS stating the organization's name; the basis on which it qualifies for an accommodation; its religious objections to providing coverage for some or all contraceptives, including the specific contraceptives to which it objects; its insurance plan name and type; and its insurance issuer's or TPA's name and contact

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[14] After the Supreme Court's decision in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), the government revised the relevant regulations effective September 14, 2015, to extend this accommodation to certain closely held for-profit entities that have a religious objection to providing coverage for some or all of the FDA-approved contraceptive methods. *See* 80 Fed. Reg. 41,318 (July 14, 2015).

information (HHS Notice),[15] *see* 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014); 80 Fed. Reg. 41,318, 41,323 (July 14, 2015); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). After HHS receives the Notice, it provides the information to DOL, which sends a separate notification to inform the religious organization's insurance issuer or TPA of the organization's objections to certain coverage. *See id.*

Once an insurance issuer or TPA receives Form 700 from the religious organization or the separate notification from DOL it must "provide or arrange payments for contraceptive services" for beneficiaries of the organization's group health plan either by providing those payments itself or by arranging for another party to do so. 29 C.F.R. § 2590.715-2713A(b)(2) (TPA); 45 C.F.R. § 147.131(c)(1)(i) (insurance issuer). With respect to TPAs, Form 700 or

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[15] Self-certification using HHS Notice was included in the regulations after the Supreme Court's order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). Wheaton College, a religious organization, challenged the accommodation process, arguing that completing Form 700 and forwarding the Form to its insurance issuer made it complicit in the provision of contraceptive coverage in violation of its religious beliefs. The Supreme Court granted injunctive relief, enjoining the government from enforcing the contraceptive mandate while the college's challenge to the accommodation process was pending, provided that the college inform HHS "in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." 134 S. Ct. at 2807. The college was not required to self-certify using Form 700. *Id.* The Court also stated, "Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the" ACA to Wheaton College's employees and students. *Id.*

HHS notice also designates the TPA "plan administrator and claims administrator for contraceptive benefits" for the religious organization. 78 Fed. Reg. at 39,879; *see also* 29 C.F.R. § 2510.3-16(b) (providing that Form 700 becomes "an instrument under which the plan is operated [and is] treated as a designation of the [TPA] as the plan administrator under section 3(16) of ERISA[, 29 U.S.C. § 1002(33),] for any contraceptive services required to be covered"); 79 Fed. Reg. at 51,095 (providing that DOL's notification to the TPA under HHS Notice also operates to "designate" the TPA "as plan administrator" under ERISA for contraceptive benefits). The insurance issuer or TPA must provide separate notice regarding contraceptive services to participants and beneficiaries enrolled in the religious organization's group health plan. 29 C.F.R. § 2590.715- 2713A(b)(2).

Dordt and Cornerstone, in accordance with their sincerely held religious beliefs, oppose the use, funding, provision, or support of abortion, and they believe that certain contraceptives required under the contraceptive mandate—Plan B, ella, and copper IUDs—are functionally equivalent to abortion. *See Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2762-63 (2104) (noting that these forms of contraceptive "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus"). They brought suit against the government, arguing that both the contraceptive mandate and the accommodation process impose a substantial burden on their exercise of religion in violation of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-bb4. They contend that the government is coercing them to violate their

religious beliefs by threatening to impose severe monetary penalties unless they either directly provide coverage for objectionable contraceptives through their group health plans or indirectly provide, trigger, and facilitate that objectionable coverage through the accommodation process. As stated above, the district court granted their request for a preliminary injunction to enjoin enforcement of the contraceptive mandate and the accommodation regulations against them.

The government raises arguments for reversal of the district court's order that are substantially similar to those asserted by the government in *Sharpe Holdings*. Specifically, the government argues that the contraceptive mandate and accommodation process do not substantially burden Dordt and Cornerstone's exercise of religion, that it has compelling interests in safeguarding public health and ensuring equal access to health care for women, and that the contraceptive mandate and accommodation process are the least restrictive means to further those compelling interests. For the reasons set forth in *Sharpe Holdings*, we conclude that by coercing Dordt and Cornerstone to participate in the contraceptive mandate and accommodation process under threat of severe monetary penalty, the government has substantially burdened Dordt and Cornerstone's exercise of religion. Also for the reasons set forth in *Sharpe Holdings*, we conclude that, even assuming that the government's interests in safeguarding public health and ensuring equal access to healthcare for women are compelling, the contraceptive mandate and accommodation process likely are not the least

restrictive means of furthering those interests.[16] Thus, based on our reasoning in *Sharpe Holdings*, we affirm the order granting injunctive relief.

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[16] Dordt and Cornerstone argue that the government's asserted "compelling interests" are fatally undermined in light of the exemptions to the contraceptive mandate and accommodation process granted to grandfathered healthcare plans and religious employers—exemptions that result in thousands of women without access to contraceptive coverage through their employers' healthcare plans. Because we affirm the district court's grant of injunctive relief on the basis that the government has failed to establish that the contraceptive mandate and accommodation process are the least restrictive means to accomplish their stated compelling interests, we decline to address Dordt and Cornerstone's assertions regarding the insufficiency of the government's compelling interests. *See Hobby Lobby*, 134 S. Ct. at 2780 ("We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . . .").